89- 1596

No.

IN THE

Supreme Court Of The United States

October Term, 1989

DENNIS RAY SUMNER,
Petitioner

vs.

THE STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE PETITIONER WAS DENIED DUE PROCESS, EQUAL PROTECTION, AND A FAIR TRIAL BY AN IMPARTIAL JURY UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO THE STATE OF ALABAMA DENYING THE PETITIONER AND HIS COUNSEL AN OPPORTUNITY TO CONSULT OUTSIDE OF THE PRESENCE OF THE VENIRE PRIOR TO STRIKING THE JURY.

II. WHETHER THE PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW DUE TO THE STATE OF ALABAMA OVERRULING THE PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT.

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Petitioner[1] respectfully prays that a Writ of Certiorari issue to review the Judgment of the Alabama Supreme Court on February 9, 1990, denying review of the issues raised concerning his convictions in this case, previously affirmed without opinion by the Alabama Court of Criminal Appeals by Judgment of September 29, 1989.

OPINIONS BELOW

Petitioner timely appealed his judgment of conviction and sentence to the Alabama Court of Criminal Appeals. By Judgment of September 29, 1989, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction and

[1]Petitioner's undersigned counsel respectfully submits that to the best of his knowledge the style of this case accurately reflects all parties having an interest in its outcome.

sentence without an opinion. The Petitioner timely filed an Application for Rehearing and 39(k) Motion in the Alabama Court of Criminal Appeals. This Application for Rehearing and 39(k) Motion was denied without opinion by the Alabama Court of Criminal Appeals on November 17, 1989.

Petitioner timely filed a Petition for Writ of Certiorari and Brief in Support in the Supreme Court of Alabama to review the Judgment of the Alabama Court of Criminal Appeals. The Alabama Supreme Court by order of February 9, 1990, denied the Petition for Writ of Certiorari.

These orders appear in full in the Appendix hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1257(a). This Petition was timely filed within ninety days of the date of the Alabama Supreme Court's Judgment and Order of February 9, 1990.

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [No person] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

The Petitioner, Dennis Ray Sumner, was arrested pursuant to a search warrant executed on his mobile home on March 28, 1988, in Montgomery, Alabama. On that date, an anonymous caller telephoned the Narcotics and Intelligence Bureau of the Montgomery Police Department and reported that controlled substances were being kept at 318 Cardinal Court, Montgomery, Alabama. A search warrant was issued based on the information obtained from the anonymous caller, and Mr. Sumner was subsequently arrested. He was indicted on June 3, 1988, by the Montgomery County Grand Jury and charged with trafficking in cocaine, possession of phentermine, possession of diazepam, possession of alprazolam, and trafficking in cannabis. (Vol. II, CR-6 to CR-9).[2]

Numerous pretrial motions were filed by the Defendant, and a Suppression Hearing was held on August 22, 1988, at which time the Defendant's Motion to Suppress Evidence obtained pursuant to the search warrant was denied. (Supp. Transcript, RT-2 to RT-33, and Vol. II, CR-55 to CR-56). During the Suppression Hearing testimony was elicited from Detective David Byrd, that the anonymous informant had not been used on previous occasions, nor had he been used since. The informant did not incriminate himself, or say that he had seen the drugs at the residence since they had

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[2] The record in this case consists of a two volume trial transcript, exhibits and pleadings numbered sequentially, and a one volume supplemental transcript of the Suppression Hearing. The Petitioner refers to the trial record as "RT-" and to the clerk's record as "CR-". Where materials referenced also appear in the Appendix to this Petition, that fact is noted.

allegedly been brought back from South Carolina. (Vol. II, RT-15). The case was tried before a jury in Montgomery County, Alabama on August 29, 30 and 31, 1988. On August 31, 1988, the jury returned a verdict of guilty of trafficking in cannabis, not guilty of possession of alprazolam, not guilty of possession of diazepam, guilty of possession of phentermine, and guilty of trafficking in cocaine (Vol. II, CR-10 to CR-14). The case was continued for presentence investigation to the 13th of September, 1988, at which time the Honorable Joseph Phelps, Circuit Judge of the Fifteenth Judicial Circuit of Alabama, sentenced the Defendant, Mr. Sumner, to life without parole for trafficking in cocaine, and a fine of One Hundred Dollars ($100) to the Victim's Compensation Fund; life without parole for trafficking in cannabis, and a fine of One Hundred Dollars ($100) to the Victim's Compensation Fund; and Twenty-Five (25) years for possession of phentermine, and a fine of One Hundred Dollars ($100) to Victim's Compensation Fund. On September 17, 1988, Mr. Sumner gave Notice of Appeal (Vol. II, CR-65 and CR-66).

Mr. Sumner timely filed an appeal to the Alabama Court of Criminal Appeals, and on September 29, 1989, that Court affirmed the trial court on appeal without a written opinion (Appendix hereto). The Petitioner timely for an Application for Rehearing and 39(k) Motion which the Court of Criminal Appeals overruled without an opinion on November 17, 1989. (Appendix hereto). The Petitioner then timely filed a Petition for Writ of Certiorari in the Supreme Court of Alabama with a Brief in Support, which was denied without opinion on February 9, 1990 by the Alabama Supreme Court. (Appendix hereto).

The two federal questions of which the Petitioner seeks review were first raised at the trial court and in both of the appellate courts. The first question presented for this court's review is the denial of the Petitioner's right to due process, equal protection and a fair trial by an impartial jury. This question was first raised at the trial court level before the jury was impaneled. Mr. Sumner's counsel made a motion for a mistrial, which was overruled. (Vol. I, RT-3 to RT-6).

> Mr. Luker: At this time, I'd like to make a motion for a mistrial on the grounds that my client has been denied his right to due process under the Fifth and Sixth Amendments to the Alabama Constitution and the U.S. Constitution, and the Fourteenth Amendment to the U.S. Constitution in that he was denied effective assistance of counsel during the jury selection. He did not have an opportunity to consult with me nor me with him after the Court finished asking the questions. We had no time whatsoever to go over the information we had derived from I believe it was a venire of 40 at that time. We didn't have time to discuss it or him take part in his defense. . . . He didn't have an opportunity to discuss with me or take part in his defense, nor me inner-act with him concerning the selection. . . .

The issue was then properly brought before the Alabama Court of Criminal Appeals in Mr. Sumner's original Brief, Reply Brief and the Application for Rehearing and 39(k) Motion. In Mr. Sumner's original brief, this issue was presented in the Argument, Issue One (Appendix hereto), and in the Application for Rehearing and 39(k) Motion at Section B (Appendix hereto). The Court of Criminal Appeals never issued an opinion on these questions, and they were properly brought before the Alabama Supreme Court in Mr. Sumner's Petition for Writ of Certiorari at Section A, (Appendix hereto) and Issue One of the Appellant's Brief in Support of Petition for Writ of Certiorari (Appendix hereto). The Supreme Court of Alabama denied the Petitioner's Writ of Certiorari without an opinion.

The second question presented for this court's review concerns the denial of the Petitioner's Motion to Suppress Evidence Seized Pursuant to the Search Warrant. This issue was first raised at the trial court level by the Petitioner by way of a Motion to Suppress Evidence and a Memorandum of Law in Support filed with the trial court on June 27, 1988, and September 6, 1988 respectively. (Appendix hereto). A Suppression Hearing was held on August 22, 1988 when these issues were verbally addressed. (Supp. Transcript).

The Motion to Suppress Evidence was denied by the trial court, and the issue was properly brought before the Court of Criminal Appeals in the Petitioner's Brief on Appeal, Reply Brief, and Application for Rehearing and 39(k) Motion. The question was raised in Issue Two of the Defendant's Brief on Appeal, and in Section "C" of the Defendant's Application for Rehearing and 39(k) Motion. (Appendix hereto). The Court of Criminal Appeals affirmed the trial court without opinion and the question was properly brought before the Alabama Supreme Court in the Petitioner's Petition for Writ of Certiorari and Brief in Support at Section "B" and Issue Two, respectively. (Appendix hereto). The Alabama Supreme Court denied Mr. Sumner's Petition for Writ of Certiorari without opinion. (Appendix hereto).

REASONS FOR GRANTING THE WRIT

I. Petitioner Was Denied Due Process, Equal Protection, And A Fair Trial By An Impartial Jury Under The Fifth, Sixth and Fourteenth Amendments To The United States Constitution Due To The State Of Alabama Denying The Petitioner And His Counsel An Opportunity To Consult Outside Of The Presence Of The Venire Prior To Striking The Jury.

The Petitioner submits that the record is clear that he was deprived of due process, equal protection of the law and a fair trial by an impartial jury throughout the course of the proceedings against him. Specifically, the Petitioner asserts that he was denied these rights through the failure of the trial court to allow him and his counsel an opportunity to consult outside the presence of the venire prior to striking the jury. The trial court's action was in direct conflict with this Honorable Court's opinion in *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932), which held that the right of the accused to assistance of counsel includes the right to assistance of counsel from the time of arraignment until the beginning of trial for the purposes of consultation, investigation, and preparation for trial.

The Petitioner additionally asserts that he was denied equal protection of the law by the trial court overruling his Motion to Suppress the Evidence Seized Pursuant to the Search Warrant. The Affidavit submitted with the search warrant did not meet the standards for probable cause as set out by this Honorable Court in *Illinois v. Gates*, 462 U.S. 13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and its progeny. The Petitioner submits that each of these instances represents a significant deprivation of his Constitutional rights, and each merits this Court's granting of the Writ. The Petitioner also submits that each instance as a strand in the whole combines to form a proceeding that is constitutionally unacceptable and supports the granting of this Writ.

A. Petitioner Was Denied Due Process, Equal Protection Of The Law, And A Fair Trial By An Impartial Jury Due To The State Of Alabama Denying The Petitioner And His Counsel An Opportunity To Consult Outside Of The Presence Of The Venire Prior To Striking The Jury.

1. *Facts*

The Petitioner, Dennis Ray Sumner, was tried before a Montgomery County jury on August 29, 30 and 31, 1988. After voir dire and before striking the jury, the Defendant's counsel asked for a few minutes outside the presence of the venire to discuss potential strikes and jury strategy with the Defendant. The Defendant's request was denied, and the Judge forced the Defendant and his lawyer to strike the jury. After the jury had been struck, they were dismissed for the day. The next day, before the jury was impaneled, Mr. Sumner's counsel made a motion for a mistrial, which was overruled (Vol. I, RT-3 to RT-6).

> Mr. Luker: At this time, I'd like to make a motion for a mistrial on the grounds that my client has been denied his right to due process under the Fifth and Sixth Amendments to the Alabama Constitution and the U.S. Constitution, and the Fourteenth Amendment of the U.S. Constitution in that he was denied effective assistance of counsel during the

> jury selection. He did not have an opportunity to consult with me nor me with him after the Court finished asking the questions. We had no time whatsoever to go over the information we had derived from I believe it was a venire of 40 at that time. We didn't have time to discuss it or him take part in his defense. . . . He didn't have an opportunity to discuss with me or take part in his defense, nor me inner-act with him concerning the selection. . . .
>
> The Court: You had ample opportunity to discuss as long as you wanted to looking straight at the jury. . . .
>
> Mr. Luker: I am suggesting that having to look eyeball to eyeball to the jury not ten feet away and discuss over a period of whatever time we were allowed, the selections in the presence of the jury impeded our ability to have an attorney-client relationship.
>
> The Court: Overruled.

Mr. Sumner was not able to participate in his own defense, and his counsel was not allowed to effectively assist him during jury selection. He was prohibited from having an effective and meaningful attorney-client relationship because the venire was sitting only a few feet away from him, and he and his attorney had to discuss potential strikes and strategy within hearing distance of the venire. He was, therefore, denied his right to due process, equal protection and a fair trial by an impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

2. *Deprivation Of Due Process, Equal Protection, And A Fair Trial By An Impartial Jury By The Trial Court Denying The Petitioner And His Counsel An Opportunity To Consult Outside Of The Presence Of The Venire Prior To Striking The Jury.*

The right of the accused to assistance of counsel includes the right to assistance of counsel from the time of arraignment until the beginning of trial for the purposes of consultation, investigation, and preparation for trial. *Powell, supra.* The trial judge, by denying Mr. Sumner his request for a few

minutes outside the presence of the venire to discuss potential strikes with his attorney, denied him an effective and meaningful attorney-client relationship. Mr. Sumner could not openly discuss the issues about the venire without the possibility of prejudicing potential jurors that could overhear their discussions. The venire could see and hear everything that went on between Mr. Sumner and his attorney regarding positive or negative reactions elicited from the venire during voir dire.

In *Geders v. United States*, 425 U.S. 90, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), this Honorable Court held that the trial court's order preventing the defendant from consulting with his counsel about anything during a 17-hour overnight recess between his direct and cross-examination deprived the defendant of his right to the assistance of counsel guaranteed by the Sixth Amendment. This Court went on to say that "such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. . . . Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Geders, supra*, at 1335.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. *Geders, supra,* citing *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed.2d 158, 170 (1932).

Geders, supra, was deemed reversible error not merely because the length of the denial, but also because it *occurred at a critical stage* of the proceedings.

In the case at bar, Mr. Sumner was denied counsel during the jury selection process, which is certainly a critical stage. The purpose of voir dire is to elicit biased or prejudicial feelings from the venire so that a fair and impartial jury can

be selected. Mr. Sumner was not allowed to openly discuss members of the venire with his counsel so that they could make tactical and strategical decisions regarding use of their strikes. The venire was sitting close enough to Mr. Sumner and his counsel that they could hear any discussions that Mr. Sumner and his attorney had. This not only inhibited Mr. Sumner and his counsel from having an attorney-client relationship, but also prejudiced potential jurors. *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) contrasted assistance of counsel to denial of counsel.

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *Cronic, supra,* at 2043-2044.
>
> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.* . . . Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. (emphasis added). *Cronic, supra,* at 2046-2047.

Prejudice in this case is apparent. Mr. Sumner was not able to participate in his own defense, and his counsel was not allowed to effectively assist him during jury selection. He

could not openly discuss the jurors or strategy without risking potential jurors overhearing his discussion. It is clearly established by the due process clause that an accused has a right to an impartial tribunal. As stated by Justice Black in *In re Murchison*, 349 U.S. 133, 136 (1955):

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in a trial of cases. But our system of law has always endeavored to prevent *even the probability of unfairness*. (emphasis added).

Deprivation of counsel is per se unconstitutional and no prejudice need to be shown. Because Mr. Sumner was denied assistance of counsel at a critical stage of the proceedings, the Writ is due to be granted, and his conviction reversed.

II. Whether The Petitioner Was Denied Equal Protection Of The Law Due To The State Of Alabama Denying The Petitioner's Motion To Suppress Evidence Seized Pursuant To The Search Warrant.

A. Petitioner Was Denied Equal Protection Of The Law Due To The State Of Alabama Denying The Petitioner's Motion To Suppress Evidence Seized Pursuant To The Search Warrant.

1. *Facts*

On March 28, 1988, an anonymous caller telephoned the Narcotics and Intelligence Bureau of the Montgomery, Alabama Police Department, and reported information concerning controlled substances being kept at 318 Cardinal Court, Montgomery, Alabama. As a result of the information obtained from the anonymous caller, a search warrant was issued and executed on the residence. Various controlled substances were seized pursuant to the search warrant, and the Petitioner, Mr. Sumner, was arrested. Mr. Sumner was indicted on June 3, 1988, by the Montgomery County, Alabama Grand Jury. (Vol. II, CR-6 to CR-9). A Suppression Hearing was held on August 22, 1988, at which time the Defendant's Motion to Suppress Evidence obtained pursuant to the search warrant was denied. (Supp. Transcript, RT-2 to

RT-33, and Vol. II, CR-55 to CR-56). During the Suppression Hearing, testimony was elicited from Detective David Byrd, that the anonymous informant had not been used on previous occasions, nor had he been used since. (Supp. Transcript, RT-10 and RT-15). The information the caller gave to the police was very general in nature, and he did not indicate how he had obtained his information. (Supp. Transcript, RT-12 to RT-13; RT-14 to RT-15). The Affidavit basically consisted of eight (8) paragraphs:

1. On March 26, 1988, Dennis Sumner returned from somewhere in South Carolina with approximately 4 kilograms of Cocaine and an undetermined amount of Marijuana;
2. The caller stated Sumner would return to his trailer, which is described as a brown trailer, and gave the following directions to the trailer: enter Village West, take the first left in front of the office, go around the curve, take the second right into the court, Sumner's trailer is the last brown trailer on the right side of the street.
3. The caller stated that Sumner goes by the nickname "Skeet," and is an ex-felon from South Carolina for drug violations.
4. The caller stated that Sumner owns a black Monte Carlo with South Carolina license plates.
5. The caller stated that Sumner is a white male, 5'08 to 5'09, 150 to 155 pounds, gray hair and gray beard, with a tatto on his right arm.
6. The caller stated that Sumner is unemployed.
7. The caller stated a white female, Ramona Hubler, lives with Sumner, and described Ramona Hubler as being about 22 years of age, with black curly hair.
8. The caller stated that Sumner stores drugs in the back bedroom of his trailer. The caller stated Sumner stores cocaine in a brown suitcase and that Sumner stores marijuana in cooler(s). The caller described the coolers as being blue and white as well as red and white in color. The caller

> also stated that Sumner stores a set of triple beam scales in the back bedroom.

The Affidavit did not state that the informant had personal knowledge, how he came to know the information, or his connection with Mr. Sumner. There is no basis of knowledge or underlying circumstances showing how the informant obtained his information. The informant did not incriminate himself, or say that he had seen the drugs at the residence since they had allegedly been brought back from South Carolina. (Vol. II, RT-15). The informant did not identify himself, or say that he had ever bought drugs from Mr. Sumner. (Supp. Transcript, RT-8 to RT-9).

The Affidavit in this case did not state sufficient specific facts or circumstances to support the finding of probable cause, therefore the trial court erred in denying Mr. Sumner's Motion to Suppress Evidence obtained pursuant to the search warrant, and the Alabama Appellate Courts erred in affirming the trial court.

2. *Deprivation Of Equal Protection Of The Law Due By The Trial Court's Overruling The Petitioner's Motion To Suppress Evidence, And The Appellate Courts' Affirmance Of The Trial Court.*

A search warrant can only be issued based on probable cause, supported by an Affidavit naming or describing a person, and particularly describing the property and place to be searched. *Code of Alabama*, Section 15-5-3 (1975). The Affidavit must state sufficient specific facts and circumstances to support a finding of probable cause. An Affidavit that is based primarily on information received from an informant must meet additional requirements. These standards are set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); and *Spinelli v. United States*, 1393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The "*Aguilar-Spinelli* two-pronged test" requires that (1) the underlying circumstances reveal the basis of the informant's knowledge that certain persons had been, was or would be involved in criminal activities or that evidence of the crime

could be found where he said they would be found, and (2) that the underlying circumstances give cause to believe that the informant is a credible person or that his information is reliable. In 1983, this Honorable Court formulated a more flexible standard for evaluating the facial sufficiency of an affidavit based on an informant tip. The *Gates*, "totality of the circumstances" test replaces the more rigid two-pronged test of *Aguilar* and *Spinelli*.

> The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge"* of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Gates, supra*, at 2332 [quoting *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960)] (emphasis added).

Although *Gates, supra*, relaxed the standards for probable cause determination, it is clear that the *Aguilar-Spinelli* analysis has not been eliminated from the factors that the magistrate must consider. "Though an informant's 'veracity' and 'basis of knowledge' are no longer to be understood as entirely separate and independent requirements, *they are still 'highly relevant' in determining whether probable cause exists.*" *Gates, supra*, at 2237. *Gates, supra*, therefore, abandoned only the strict application of the old test, *not* the substance of veracity, reliability and basis of knowledge.

When the *Gates* "totality of the circumstances' test is applied to the facts in Mr. Sumner's case, it is clear that the affidavit does not meet the probable cause necessary for issuing a search warrant. The affidavit in this case is based upon an anonymous phone call made to the Montgomery, Alabama Police Department on March 28, 1988 (Supp. Transcript, RT-7). The unidentified anonymous caller reported information to Detective David Byrd regarding the Petitioner, Dennis Sumner. The informant did not identify himself or say that he had ever bought drugs from Mr. Sumner (Supp. Transcript, RT-8 to RT-9). The anonymous caller had not been used before he called on March 28, 1988,

and the police have not talked to him since (Supp. Transcript, RT-10 and RT-15). The information the caller gave to the police was very general in nature and he did not indicate how he had obtained his information. (Supp. Transcript, RT-12 to RT-13; RT-14 to RT-15).

The affidavit did not state that the informant had personal knowledge, how he came to know the information, or his connection with Mr. Sumner. There is no basis of knowledge or underlying circumstances showing how the informant obtained the information or how he concluded that Mr. Sumner was engaged in criminal activity. "The mere assertion that the informant speaks from personal knowledge *without a factual basis or data illustrative of that conclusion* is not sufficient." *United States v. Long*, 142 U.S.App.D.C. 118, 439 F.2d 628 (1971); *Channell v. State*, 477 So.2d 522 (Ala.Cr.App. 1985); and *Hatton v. State*, 359 So.2d 822 (Ala.Cr.App. 1977) (emphasis added). Anyone who casually knew Mr. Sumner could have told the police what he looks like, where he lives and what kind of car he drives. There is no basis for the information in paragraph 1. The fact that Mr. Sumner's car had South Carolina tags on it could be used to presume that he had "returned from somewhere in South Carolina." The caller did not say that he had seen the drugs, tried to buy some of the drugs, or even knew what drugs looked like. Conclusions or presumptions made by an informant are inadequate to support probable cause.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in *sufficient detail* that the magistrate may know that he is relying on *something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.* (emphasis added). *Spinelli, supra.*

In Mr. Sumner's case, however, self-verifying detail is missing. General innocent information is not enough to overcome the lack of a basis of knowledge. The tip is conclusory only, not supported by any factual basis. "The mere conclusion of an informant is not sufficient to establish

probable cause. The informant must have some basis for the conclusion, and he must relate that basis to the law enforcement officer." *Roberson v. State*, 340 So.2d 459 (1976).

The information relayed in paragraph 8 is a description of the area where Mr. Sumner allegedly "stores drugs." This general allegation does not speak to the time of when drugs were stored there, so there is no nexus tying the alleged crime to the tip. When the information given has no connection with the date of the issuance of the warrant there is no existing present cause to support a warrant. Vagueness of the time element is fatal in affidavits supporting search warrants. In order to support a search warrant, the proof supplied must speak as of the time of the issuance of the warrant. *Sgro v. United States*, 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed.2d 260, 263 (1932). Not only is the tip supplied here vague in time, but it also speaks in a tense that does not tie it to the particular transaction in question. Although the caller had apparently been in Mr. Sumner's trailer at some point in time, there is no indication of when, nor is there any showing that he had seen drugs in the trailer since Mr. Sumner's alleged return from South Carolina, the transaction upon which the warrant is based.

Mr. Luker: Other than the statement in paragraph 8 of your affidavit, the informant gave you no information concerning when he saw drugs at 318 Cardinal Court; did he?

Detective Byrd: That's correct.

Mr. Luker: And he didn't tell you he had seen drugs that had been transported from South Carolina to 318 Cardinal Court; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you how he knew that to be a fact; did he?

Detective Byrd: That's a fact.

Mr. Luker: That's a fact meaning he did not tell you how he knew?

Detective Byrd: Yes, he did not tell me.

Mr. Luker: He did not tell you?

Detective Byrd: He did not tell me how he knew that drugs were being transported from South Carolina.

(Supp. Transcript, RT-12 to RT-13).

Because there is no showing that the informant knew of drugs being stored in Mr. Sumner's trailer at the time in question, the warrant is defective.

Mr. Luker: Besides the transporation he had no basis to tell you, he didn't tell you how he knew that in Paragraph 8?

Detective Byrd: Those facts that you've mentioned, his employment, who lived with him, they gave me no cause to suspect criminal activity.

Mr. Luker: So other than the fact that the informant told you that Mr. Sumner returned two days previous from South Carolina with drugs, and that he stored drugs in the back bedroom, you had no other information concerning Mr. Sumner and any possible violation of the law?

Detective Byrd: That is all that the caller told me that would give me any information about Mr. Sumner's criminal activity.

Mr. Luker: And on those two points, the caller did not tell you how he knew that he returned from South Carolina with drugs; he did not tell you that he was a participant in that transportation of drugs; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that he had seen drugs in that car; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that Mr. Sumner told him he was bringing drugs back; did he?

Detective Byrd: No.

Mr. Luker: Now, as to the drugs in the house, he did not tell you that he had been in the house and seen drugs that were returned from South Carolina in that house?

Detective Byrd: No.

Mr. Luker: Did the informant tell you the most recent time he had been in the house?

Detective Byrd: No, he didn't.

(Supp. Transcript, RT-13 to RT-14).

Mr. Luker: The informant did not tell you that he had been in the house since the drugs had been brought back from South Carolina; did he?

Detective Byrd: No.

(Supp. Transcript, RT-15).

> We conclude that a combination of *undated, conclusory information* from an anonymous source and an *undated general allegation of personal observation* by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate. . . . Police officers have long been accustomed to the importance of time; to their credit, the overwhelming majority of affidavits have honored the requirement. *Davis v. State,* 237 So.2d 635 (1969) at 639 (quoting *Rosencranz v. United States,* 1 Cir., 356 F.2d 310).

Although the affidavit need not state the exact time the informant observed the offense, the affidavit in this case fails to state any time at all when the caller observed the alleged transaction. "Absent fresh information, the likelihood that illegal contraband is still on the premises becomes too remote to support a finding of probable cause," *Keller v. State,* 305 So.2d 402 (Ala.Cr.App. 1974).

The credibility and reliability of the informant are clearly lacking in this case. There is no showing of past performance by the informant nor did he incriminate himself in any way. The informant, then, had no past performance or indicia of reliability. When an unknown or questionable informer is

used, as here, his tip may be corroborated to establish probable cause for the issuance of the warrant. In this affidavit, the Narcotics and Intelligence Bureau only corroborated innocent details such as Mr. Sumner's address, his automobile, the establishment of a power account and a cursory NCIC computer check. No corroboration was made of any incriminating details, so there was nothing in this case beyond mere *suspicion* that Mr. Sumner might have had drugs in his possession. That is an insufficient nexus between the corroborated details and the alleged crime. There is nothing to negate the chance that the informer is, for his own reasons, pointing to an innocent man.

The trial court found the case of *Bishop v. State*, 518 So.2d 829 (Ala.Cr. App. 1987), to be controlling. (Vol. II, CR-56). *Bishop, id.*, however, has some additional facts that are not present in Mr. Sumner's case. In addition to verifying innocuous information, the police in *Bishop, supra*, began a surveillance on the defendant's residence. A known drug offender, Neece, was seen going in and out of the defendant's residence, and after he exited the house he was subsequently stopped and cocaine was found in his possession which had been purchased with marked currency supplied by the Mobile County Sheriff's Department. This type of corroboration is certainly more valuable and reliable in supporting probable cause than that in Mr. Sumner's case. *Bishop, supra*, then, is not controlling as the trial court held.

In Mr. Sumner's case, the affidavit is void of any facts from which a magistrate could reasonably conclude that the informant is credible or that his information is reliable. There is no allegation of the previous reliability of this informant. No underlying facts were provided demonstrating the credibility of the informant or the basis of his knowledge. There is no nexus between the particular transaction upon which the warrant was issued and the informant's tip. The "tip" provided nothing more than a conclusion or rumor that Mr. Sumner was engaging in "suspect" activities. When there is no basis of knowledge, even elaborate detail is insufficient because it does not eliminate the possibility that the informant's conclusions are based on unjustified speculation or

rumor of the defendant's general reputation. "What should be required, then before details are characterized as self-verifying, is that *the facts detailed are incriminating facts rather than innocent facts*." W. LaFave, 1 *Search and Seizure* 675 (1978). The affidavit in this case, does not meet the "totality of the circumstances" set out in *Gates, supra*, nor does it meet either prong of the *Aguilar-Spinelli* test. The affidavit is, therefore, insufficient, and cannot be used to support probable cause. For these reasons, the Petitioner would respectfully submit that the Writ is due to be granted and his conviction reversed.

CONCLUSION

For these reasons, both separately and severally, and to prevent a miscarriage of justice, Petitioner prays that a Writ of Certiorari issue to review the judgment of the Alabama Supreme Court.

Respectfully submitted,

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APPENDIX

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THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

February 9, 1990

89-326

Ex parte Dennis Ray Sumner

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Dennis Ray Sumner v. State)

(CRC 3/81 (Montgomery CC-88-1405))

ORDER

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

STEAGALL, J. — Hornsby, CJ., Maddox, Shores, Houston and Kennedy, JJ., concur;
Jones, Almon and Adams, JJ., dissent.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9 day of Feb. 1990.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

S.C. NO. _____

EX PARTE:

DENNIS RAY SUMNER,
Petitioner,

IN RE:

DENNIS RAY SUMNER,
Appellant,

vs.

THE STATE OF ALABAMA,
Appellee.

ON APPEAL FROM THE
MONTGOMERY COUNTY CIRCUIT COURT
FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA
(CASE NO. CC 88-1405-PH)

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE
COURT OF CRIMINAL APPEALS OF ALABAMA
(3RD Div. 81)

DAVID S. LUKER
ATTORNEY FOR APPELLANT
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA:

Comes now your Petitioner, Dennis Ray Sumner, by and through his undersigned attorney, and petitions this Honorable Court for a Writ of Certiorari to issue to the Honorable Court of Criminal Appeals of Alabama in the above styled cause pursuant to Rules 39 and 41 of the *Alabama Rules of Appellate Procedure*, and as grounds therefore, shows the following:

1. That the Petitioner was convicted of trafficking in cannabis, possession of phentermine, and trafficking in cocaine on August 31, 1988 in the Circuit Court of Montgomery County, Alabama, in case # CC 88-1405-PH. (Vol. II, CR-10 to CR-14). On March 28, 1988, an anonymous caller telephoned the Narcotics and Intelligence Bureau of the Montgomery, Alabama Police Department and reported information concerning controlled substances being kept at 318 Cardinal Court, Montgomery, Alabama. As a result of the information obtained from the anonymous caller, a search warrant was issued and executed on the residence. Various controlled substances were seized pursuant to the search warrant, and the Defendant, Mr. Sumner, was arrested. A Suppression Hearing was held on August 22, 1988, at which time the Defendant's Motion to Suppress Evidence obtained pursuant to the search warrant was denied. (Supp. Record, RT-2 to RT-33; Vol. II, CR-55 to CR-56). The case was tried on August 29, 30, and 31, and on August 31, 1988, the jury returned a verdict of guilty of trafficking in cannabis, not guilty of possession of alprazolam, not guilty of possession of diazepam, guilty of possession of phentermine, and guilty of trafficking in cocaine (Vol. II, CR-10 to CR-14). During the Suppression Hearing testimony was elicited from Detective David Byrd, that the anonymous informant had not been used on previous occasions, nor had he been used since. The informant did not incriminate himself, or say that he had seen the drugs at the residence since they had allegedly been brought back from South Carolina (Vol. II, RT-15). Detective Byrd testified at trial that at the time the

search warrant was executed, three people were found at the residence. They were the Defendant, Mr. Sumner; a female, Ramona Hubler; and another female, Vickie Beto (Vol. I, RT-10). None of these three people were found in or near the back bedroom, where the drugs were recovered (Vol. I, RT-10 to RT-11, RT-15, RT-19). At the close of the State's case, the Defendant made a Motion for a Judgment of Acquittal on the grounds that the State had failed to prove a prima facie case. The Defendant's motion was denied (Vol. I, RT-161). The Defendant was convicted of trafficking in cannabis, possession of phentermine, and trafficking in cocaine (Vol. II, CR-10, CR-13, CR-14). Mr. Sumner was found not guilty of possession of alprazolam, and not guilty of possession of diazepam (Vol. II, CR-11 and CR-12). Mr. Sumner was sentenced on September 13, 1988, and gave Notice of Appeal on September 17, 1988 (Vol. II, CR-65 and CR-66). On September 29, 1989, the Court of Criminal Appeals of Montgomery County, Alabama affirmed, *without opinion,* the judgment of the Circuit Court of Montgomery County, Alabama.

2. A copy of the certificate of the intermediate Appellate Court is attached to this Petition which shows the Court of Criminal Appeals number to be Third Division 81 (see Exhibit A attached hereto).

3. Pursuant to Rule 40 of the *Alabama Rules of Appellate Procedure*, and the decision of the Court of Criminal Appeals in *Cox v. State,* 380 So.2d 384 (Ala.Cr.App. 1980), Sumner resubmitted his original brief for consideration in support of his Application for Rehearing and 39(k) Motion by reassigning the issues raised in his original brief.

4. Pursuant to the *Alabama Rules of Appellate Procedure,* the Petitioner filed an Application for Rehearing and 39(k) Motion assigning three errors by the intermediate Appellate Court and attached additional arguments in his Application for Rehearing and 39(k) Motion.

5. On October 18, 1989, the Court of Criminal Appeals denied the Appellant's Application for Rehearing and 39(k) Motion. In his 39(k) Motion, the Appellant moved the Court of Criminal Appeals to accept the following Statement of Facts, or in the alternative, to state facts in evidence pre-

sented upon rehearing. The Court of Criminal Appeals denied the Appellant's 39(k) Motion, and he now moves this Honorable Court to accept the following Statement of Facts. The Appellant has attached hereto copies of the Application for Rehearing and 39(k) Motion (see Exhibit B attached hereto).

On March 28, 1988, an anonymous caller telephoned the Narcotics and Intelligence Bureau of the Montgomery, Alabama Police Department, and reported information concerning controlled substances being kept at 318 Cardinal Court, Montgomery, Alabama. As a result of the information obtained from the anonymous caller, a search warrant was issued and executed on the residence. Various controlled substances were seized pursuant to the search warrant, and the Defendant, Mr. Sumner, was arrested. Mr. Sumner was indicted on June 3, 1988, by the Montgomery County Grand Jury (Vol. II, CR-6 to CR-9). A Suppression Hearing was held on August 22, 1988, at which time the Defendant's Motion to Suppress Evidence obtained pursuant to the search warrant was denied. (Supp. Record, RT-2 to RT-33; Vol. II, CR-55 to CR-56). The case was tried on August 29, 30, and 31, and on August 31, 1988, the jury returned a verdict of guilty of trafficking in cannabis, not guilty of possession of alprazolam, not guilty of possession of diazepam, guilty of possession of phentermine, and guilty of trafficking in cocaine (Vol. II, CR-10 to CR-14). During the Suppression Hearing testimony was elicited from Detective David Byrd, that the anonymous informant had not been used on previous occasions, nor had he been used since. The informant did not incriminate himself, or say that he had seen the drugs at the residence since they had allegedly been brought back from South Carolina (Vol. II, RT-15). Detective Byrd testified at trial that at the time the search warrant was executed, three people were found at the residence. They were the Defendant, Mr. Sumner; a female, Ramona Hubler; and another female, Vickie Beto (Vol. I, RT-10). None of these three people were found in or near the

back bedroom, where the drugs were recovered (Vol. I, RT-10 to RT-11, RT-15, RT-19). At the close of the State's case, the Defendant made a Motion for a Judgment of Acquittal on the grounds that the State had failed to prove a prima facie case. The Defendant's motion was denied (Vol. I, RT-161). The Defendant was convicted of trafficking in cannabis, possession of phentermine, and trafficking in cocaine (Vol. II, CT-10, CR-13, CR-14). Mr. Sumner was found not guilty of possession of alprazolam, and not guilty of possession of diazepam (Vol. II, CR-11 and CR-12). Mr. Sumner was sentenced on September 13, 1988, and gave Notice of Appeal on September 17, 1988 (Vol. II, CR-65 and CR-66).

6. The basis of the Petition is as follows:

A.

Pursuant to Rule 39(c)(4) to the *Alabama Rules of Appellate Procedure*, the Petitioner asserts that the issue raised in Section I of his Brief on Appeal, but not addressed by the intermediate Appellate Court because of the affirmance *without opinion*, is in direct conflict with the opinions of the Supreme Court of the United States in *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932); *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1987). Sumner asserts that the affirmance *without opinion* is also in direct conflict with the Eleventh Circuit and former Fifth Circuit opinions in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986); *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984); and *United States v. Conway*, 632 F.2d 641 (5th Cir. Unit B, 1980); and *Chadwick v. Green*, 740 F.2d at 900 (11th Cir. 1984). The affirmance *without opinion* is also in direct conflict with the Honorable Court of Criminal Appeals' opinion in *Payne v. State*, 421 So.2d 1303 (Ala.Cr.App. 1982), and *Ashurst v. State*, 424 So.2d 691 (Ala.Cr.App. 1982). Mr. Sumner was denied his right of due process, equal protection and a fair trial by an impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article

I, Section 6 of the Constitution of the State of Alabama. Mr. Sumner was unable to participate in his own defense, and his counsel was not allowed to effectively assist him during jury selection, a violation of the Sixth Amendment of the Constitution of the United States.

After voir dire, and before striking the jury, the Defendant's counsel asked for a few minutes outside of the presence of the venire to discuss potential strikes with the Defendant. The request was denied, and the Judge forced the Defendant's lawyer to strike the jury. The next day before the jury was empaneled, Mr. Sumner's counsel made a motion for a mistrial, which was overruled. (Vol. I, RT-3 to RT-6). Mr. Sumner was prohibited from having an effective and meaningful attorney-client relationship because the venire was sitting only a few feet away from him, and he and his attorney had to discuss potential strikes within hearing distance of the venire. Mr. Sumner and his attorney could not openly discuss the issues about the venire without the possibility of prejudicing potential jurors who could overhear their discussions. The venire could see and hear everything that went on between Mr. Sumner and his attorney regarding positive or negative reactions elicited from the venire during voir dire. The right of the accused to assistance of counsel includes the right to assistance of counsel from the time of arraignment until the beginning of trial for the purposes of consultation, investigation and preparation for trial. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). Mr. Sumner was denied effective assistance of counsel during jury selection. Any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986). In *Crutchfield, id*, the trial court instructed the defendant not to talk with his counsel during the defendant's testimony. The length of the recess was in dispute, but because Crutchfield's counsel did not object, move for a mistrial, or ask to discuss non-testimonial aspects of the case with his client, the Eleventh Circuit held that Crutchfield was not deprived of the right to assistance of counsel. The court did, however, reaffirm the rationale of *United States v. Conway*, 632 F.2d 641 (5th Cir. Unit B 1980) and *United States*

v. Romano, 736 F.2d 1432 (11th Cir. 1984) in holding that any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. "Where *actual or constructive* denial of assistance of counsel occurs a per se rule of prejudice applies." *Crutchfield, supra,* citing *Chadwick v. Green,* 740 F.2d at 900 n.3 (11th Cir. 1984) (emphasis added).

Payne v. State, 421 So.2d 1303 (Ala.Cr.App. 1982) and *Ashurst v. State,* 424 So.2d 691 (Ala.Cr.App. 1982) are two cases following the per se rule of denial of assistance of counsel. In *Ashurst, id,* the Court of Criminal Appeals held that prohibiting defense counsel from talking to the defendant, once the defendant had started testifying, until such time as the defendant had completed his testimony, including all breaks and recesses, was an unconstitutional deprivation of the right to counsel. "The question presented is whether a restriction, however brief, on a criminal defendant's right to confer with counsel is tantamount to an unconstitutional deprivation of the right to counsel. We think it is." *Ashurst, supra,* citing *Payne, supra,* at 1305.

The two leading United States Supreme Court cases in this area are *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), and *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Geders, supra,* the Supreme Court held that the trial court's order preventing the defendant from consulting with his counsel about anything during a 17 hour overnight recess between his direct and cross-examination deprived the defendant of his right to the assistance of counsel guaranteed by the Sixth Amendment. The Court went on to say that "such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. . . . Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Geders, supra,* at 1335.

Geders, supra, was deemed reversible error not merely because of the length of the denial, but also because it *occurred at a critical stage* of the proceedings. In this case, Mr. Sumner was denied counsel prior to jury selection, which is certainly a critical stage. The purpose of voir dire is to elicit

biased or prejudicial feelings from the venire so that a fair and impartial jury can be selected. Mr. Sumner was not allowed to openly discuss members of the venire with his counsel so that they could make tactical and strategical decisions regarding use of their strikes. The venire was sitting close enough to Mr. Sumner and his counsel that they could hear any discussions that Mr. Sumner and his attorney had. This not only inhibited Mr. Sumner and his counsel from having an attorney-client relationship, but also prejudiced potential jurors. *Cronic, supra,* contrasted assistance of counsel to denial of counsel.

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries". Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail", as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

Cronic, supra, at 2043-2044.

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. *. . . Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.* (emphasis added).

Cronic, supra, at 2046-2047. Any deprivation of assistance of counsel constitutes reversible error, and necessitates a new

trial. Because Mr. Sumner was denied assistance of counsel at a critical stage of the proceedings, his conviction is due to be reversed, and the Court of Criminal Appeals, therefore erred in affirming the Circuit Court of Montgomery County.

B.

Sumner asserts that the issue raised in Section II of his Brief on Appeal, but not addressed by this Honorable Court because of the affirmance *without opinion* is in direct conflict with the opinion of the Supreme Court of the United States in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960); and *Sgro v. United States,* 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed.2d 260 (1932). Sumner asserts that the affirmance without opinion is also in direct conflict with the *Code of Alabama,* Section 15-5-3 (1975), and with the Alabama Supreme Court's opinions in *Alford v. State,* 381 So.2d 203 (1980); *Tyler v. State,* 45 So.2d 442 (1969); *Brandeis v. State,* 219 So.2d 404 (1968); *Brown v. State,* 167 So.2d 281 (1964); *Roberson v. State,* 340 So.2d 459 (1976); *Davis v. State,* 237 So.2d 635 (1969); *Attorney General v. State,* 286 Ala. 117, 237 So.2d 640 (1970); *Horzempa v. State,* 290 So.2d 217 (1973); and *Neugent v. State,* 340 So.2d 43 (1975). Sumner asserts that the affirmance *without opinion* is in direct conflict with the Honorable Court of Criminal Appeals's opinion in *Channell v. State,* 477 So.2d 522 (Ala.Cr. App. 1985); *Hatton v. State,* 359 So.2d 822 (Ala.Cr.App. 1977); *Stikes v. State,* 397 So.2d 178 (Ala.Cr.App. 1981); *Walker v. State,* 275 So.2d 724 (Ala.Cr.App. 1973); *Keller v. State,* 305 So.2d 402 (Ala.Cr.App. 1974); *Reese v. State,* 456 So.2d 341 (Ala.Cr.App. 1982); *Travis v. State,* 381 So.2d 97 (Ala.Cr.App. 1979) *cert. denied,* 381 So.2d 102 (Ala. 1980); *Rickman v. State,* 361 So.2d 22 (Ala.Cr.App. 1978); *Waters v. State,* 360 So.2d 347 (Ala.Cr.App. 1978); and *Murray v. State,* 396 So.2d 125 (Ala.Cr.App. 1981).

A search warrant can only be issued based on probable cause, supported by an affidavit naming or describing the

person and particularly describing the property and place to be searched. *Code of Alabama,* Section 15-5-3 (1975). The affidavit must state sufficient *specific facts or circumstances* to support a finding of probable cause. *Alford v. State,* 381 So.2d 203 (1980); *Tyler v. State,* 45 So.2d 442 (1969); *Brandeis v. State,* 219 So.2d 404 (1968); *Brown v. State,* 167 So.2d 281 (1964). An affidavit that is based primarily on information received from an informant must meet additional requirements. These standards are set out in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The "*Aguilar-Spinelli* two-pronged test" requires that (1) the underlying circumstances reveal the basis of the informant's knowledge that certain persons had been, was or would be involved in criminal activities or that evidence of the crime could be found where he said they would be found, and (2) that the underlying circumstances give cause to believe that the informant is a credible person or that his information is reliable. In 1983, the United States Supreme Court formulated a more flexible standard for evaluating the facial sufficiency of an affidavit based on an informant tip. The *Gates, supra,* "totality of the circumstances" test replaces the more rigid two-pronged test of *Aguilar, supra,* and *Spinelli, supra.*

> The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge"* of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gates, supra, at 2332 [quoting *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960)] (emphasis added). Although *Gates, supra,* relaxed the standards for probable cause determination, it is clear that the *Aguilar-Spinelli* analysis has not been eliminated from the factors that the magistrate must consider. "Though an informant's 'veracity' and 'basis of knowledge' are no longer to be understood as

entirely separate and independent requirements, they are still 'highly relevant' in determining whether probable cause exists." *Gates, supra,* at 2237. *Gates, supra,* therefore, abandoned only the strict application of the old test, *not* the substance of veracity, reliability and basis of knowledge.

When the *Gates* "totality of the circumstances" test is applied to the facts in Mr. Sumner's case, it is clear that the affidavit does not meet the probable cause necessary for issuing a search warrant. The affidavit in this case is based upon an anonymous phone call made to the Montgomery, Alabama Police Department on March 28, 1988 (Supp. Rec., RT-7). The unidentified anonymous caller reported information to Detective David Byrd regarding the Defendant, Dennis Sumner. The informant did not identify himself or say that he had ever bought drugs from Mr. Sumner (Supp. Rec., RT-8 to RT-9). The anonymous caller had not been used before he called on March 28, 1988, and the police have not talked to him since (Supp. Rec. RT-10 and RT-15). The information the caller gave to the police was very general in nature and he did not indicate how he had obtained his information. (Supp. Rec., RT-12 to RT-13; RT-14 to RT-15). The affidavit basically consisted of eight paragraphs:

1. On March 26, 1988, Dennis Sumner returned from somewhere in South Carolina with approximately 4 kilograms of Cocaine and an undetermined amount of Marijuana;
2. The caller stated Sumner would return to his trailer, which is described as a brown trailer, and gave the following directions to the trailer: enter Village West, take the first left in front of the office, go around the curve, take the second right into the court, Sumner's trailer is the last brown trailer on the right side of the street.
3. The caller stated that Sumner goes by the nickname "Skeet", and is an ex-felon from South Carolina for drug violations.
4. The caller stated that Sumner owns a black Monte Carlo with South Carolina license plates.
5. The caller stated that Sumner is a white male, 5'08 to 5'09, 150 to 155 pounds, gray hair and gray bread, with a tattoo on his right arm.

6. The caller stated that Sumner is unemployed.
7. The caller stated a white female, Ramona Hubler, lives with Sumner, and described Ramona Hubler, as being about 22 years of age, with black curly hair.
8. The caller stated that Sumner stores drugs in the back bedroom of his residence. The caller stated Sumner stores cocaine in a brown suitcase and that Sumner stores marijuana in cooler(s). The caller described the coolers as being blue and white as well as red and white in color. The caller also stated that Sumner stores a set of triple beam scales in the back bedroom.

Other than the information in paragraphs 1 and 8, the rest of the information is not relevant to the issue. The affidavit does not state that the informant had personal knowledge, how he came to know the information, or his connection with Mr. Sumner. There is no basis of knowledge or underlying circumstances showing how the informant obtained his information or how he concluded that Mr. Sumner was engaged in criminal activity. "The mere assertion that the informant speaks from personal knowledge *without a factual basis or data illustrative of that conclusion* is not sufficient." *United States v. Long*, 142 U.S.App.D.C. 118, 439 F.2d 628 (1971); *Channell v. State*, 477 So.2d 522 (Ala.Cr.App. 1985); and *Hatton v. State*, 359 So.2d 822 (Ala.Cr.App. 1977) (emphasis added). Anyone who casually knew Mr. Sumner could have told the police what he looks like, where he lives and what kind of car he drives. There is no basis for the information in paragraph 1. The fact that Mr. Sumner's car had South Carolina tags on it could be used to presume that he had "returned from somewhere in South Carolina". The caller did not say that he had seen the drugs, tried to buy some of the drugs, or even knew what drugs looked like. Conclusions or presumptions made by an informant are inadequate to support probable cause. *Spinelli, supra*, hold that self-verifying details may be enough to overcome the lack of a basis of knowledge.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially

> important that the tip describe the accused's criminal activity in *sufficient detail* that the magistrate may know that he is relying on *something more substantial than a casual rumor circulating in the underworld or an accusation based merely on a individual's general reputation.* (emphasis added).

In Mr. Sumner's case, however, self-verifying detail is missing. General innocent information is not enough to overcome the lack of a basis of knowledge. The tip is conclusory only, not supported by any factual basis. "The mere conclusion of an informant is not sufficient to establish probable cause. The informant must have some basis for the conclusion, and he must relate that basis to the law enforcement officer." *Roberson v. State,* 340 So.2d 459 (1976).

The information relayed in paragraph 8 is a description of the area where Mr. Sumner allegedly "stores drugs". This general allegation does not speak to the time when drugs were stored there, so there is no nexus tying the alleged crime to the tip. *Stikes v. State,* 397 So.2d 178 (Ala.Cr.App. 1981). When the information given has no connection with the date of the issuance of the warrant there is no existing present cause to support a warrant. Vagueness of the time element is fatal in affidavits supporting search warrants. *Walker v. State,* 275 So.2d 724 (Ala.Cr.App. 1973); *Keller v. State,* 305 So.2d 402 (Ala.Cr.App. 1974). In order to support a search warrant, the proof supplied must speak as of the time of the issuance of the warrant. *Sgro v. United States,* 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed.2d 260, 263 (1932); *Reese v. State,* 456 So.2d 341 (Ala.Cr.App. 1982); *Travis v. State,* 381 So.2d 97, 100 (Ala.Cr.App. 1979), *cert. denied,* 381 So.2d 102 (Ala. 1980). Not only is the tip supplied here vague in time, but it also speaks in a tense that does not tie it to the particular transaction in question. Although the caller had apparently been in Mr. Sumner's trailer at some point in time, there is no indication of when, nor is there any showing that he had seen drugs in the trailer Mr. Sumner's alleged return from South Carolina, the transaction upon which the warrant is based.

Mr. Luker: Other than the statement in paragraph 8 of your affidavit, the informant gave you no information concerning when he saw drugs at 318 Cardinal Court; did he?

Detective Byrd: That's correct.

Mr. Luker: And he didn't tell you he had seen drugs that had been transported from South Carolina to 318 Cardinal Court; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you how he knew that to be a fact; did he?

Detective Byrd: That's a fact.

Mr. Luker: That's a fact meaning he did not tell you how he knew?

Detective Byrd: Yes, he did not tell me.
Mr. Luker: He did not tell you?

Detective Byrd: He did not tell me how he knew that drugs were being transported from South Carolina.

(Supp. Rec., RT-12 to RT-13). Because there is no showing that the informant knew of drugs being stored in Mr. Sumner's trailer at the time in question, the warrant is defective.

Mr. Luker: Besides the transporation he had no basis to tell you, he didn't tell you how he knew that in Paragraph 8?

Detective Byrd: Those facts that you've mentioned, his employment, who lived with him, they gave me no cause to suspect criminal activity.

Mr. Luker: So other than the fact that the informant told you that Mr. Sumner returned two days previous from South Carolina with drugs, and that he stored drugs in the back bedroom, you had no other information concerning Mr. Sumner and any possible violation of the law?

Detective Byrd: That is all that the caller told me that would give me any information about Mr. Sumner's criminal activity.

Mr. Luker: And on those two points, the caller did not tell you how he knew that he returned from South Carolina with drugs; he did not tell you that he was a participant in that transportation of drugs; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that he had seen drugs in that car; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that Mr. Sumner told him he was bringing drugs back; did he?

Detective Byrd: No.

Mr. Luker: Now, as to the drugs in the house, he did not tell you that he had been in the house and seen drugs that were returned from South Carolina in that house?

Detective Byrd: No.

Mr. Luker: Did the informant tell you the most recent time he had been in the house?

Detective Byrd: No, he didn't.

(Supp. Rec., RT-13 to RT-14).

Mr. Luker: The informant did not tell you that he had been in the house since the drugs had been brought back from South Carolina; did he?

Detective Byrd: No.

(Supp. Rec., RT-15).

> We conclude that a combination of *undated, conclusory information* from an anonymous source and an *undated general allegation of personal observation* by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate. . . . Police officers have long been accustomed to the importance of time; to their credit, the overwhelming majority of affidavits have honored the requirement.

Davis v. State, 237 So.2d 635 (1969) at 639 (quoting *Rosencranz v. United States,* 1 Cir., 356 F.2d 310). Although the affidavit need not state the exact time the informant ob-

served the offense, the affidavit in this case fails to state any time at all when the caller observed the alleged transaction. "Absent fresh information, the likelihood that illegal contraband is still on the premises becomes too remote to support a finding of probable cause," *Keller, supra,* at 404.

The credibility and reliability of the informant are clearly lacking in this case. There is no showing of past performance by the informant nor did he incriminate himself in any way. (Supp. Rec., RT-15). The informant, then, had no past performance or indicia of reliability. When an unknown or questionable informer is used, as here, his tip may be corroborated to establish probable cause for the issuance of the warrant. *Rickman v. State,* 361 So.2d 22 (Ala.Cr.App. 1978); *Hatton supra; Attorney General v. State,* 286 Ala. 117, 237 So.2d 640 (1970). The corroboration, however, must be of incriminating details and not general innocent information. *Waters v. State,* 360 So.2d 347 (Ala.Cr.App. 1978); *Murray v. State,* 396 So.2d 125 (Ala.Cr.App. 1981). In this affidavit, the Narcotics and Intelligence Bureau only corroborated innocent details such as Mr. Sumner's address, his automobile, the establishment of a power account and a cursory NCIC computer check. No corroboration was made of any incriminating details, so there was nothing in this case beyond mere *suspicion* that Mr. Sumner might have had drugs in his possession. That is an insufficient nexus between the corroborated details and the alleged crime. There is nothing to negate the chance that the informer is, for his own reasons, pointing to an innocent man. *Stikes, supra.*

Horzempa v. State, 290 So.2d 217 (1973), had a much stronger showing of reliability and credibility than Mr. Sumner's case does. In *Horzempa, id,* however, the warrant still failed because it lacked sufficient underlying circumstances to establish probable cause. Two different reliable informants had been in the defendant's residence of several occasions and had made numerous drug buys for the affiant over a space of two weeks, the last of which was three days preceding the warrant. Both informants stated that the drugs were in the defendant's house.

The Supreme Court of Alabama held that the information given was insufficient to support probable cause for a search warrant.

> But the instant affidavit . . . does not state how the informants learned of the drugs being in the house. Nor does it show how they arrived at the statement as to the presence of the drugs being there "now". Nor does it show whether the informants saw, touched, smelled, bought, or otherwise came in contact with the drugs on the several "recent" occasions when they were in the residence.

Neugent v. State, 340 So.2d 43, 49 (1975) (quoting *Horzempa*). If the information provided in *Horzempa, supra,* is insufficient, then the information in Mr. Sumner's case is certainly not enought to support probable cause.

The trial court found the case of *Bishop v. State,* 518 So.2d 829 (Ala.Cr. App. 1987), to be controlling. (Vol. II, CR-56). *Bishop, id,* however, has some additional facts that are not present in Mr. Sumner's case. In addition to verifying innocuous information, the police in *Bishop, supra,* began a surveillance on the defendant's residence. A known drug offender, Neece, was seen going in and out of the defendant's residence, and after he exited the house he was subsequently stopped and cocaine was found in his possession which had been purchased with marked currency supplied by the Mobile County Sheriff's Department. This type of corroboration is certainly more valuable and reliable in supporting probable cause than that in Mr. Sumner's case. *Bishop, supra,* then, is not controlling as the trial court held.

In Mr. Sumner's case, the affidavit is void of any facts from which a magistrate could reasonably conclude that the informant is credible or that his information is reliable. There is no allegation of the previous reliability of this informant. No underlying facts were provided demonstrating the credibility of the informant or the basis of his knowledge. There was no nexus between the particular transaction upon which the warrant was issued and the informant's tip. The "tip" provided nothing more than a conclusion or rumor that Mr. Sumner was engaging in "suspect" activities. When there is

no basis of knowledge, even elaborate detail is insufficient because it does not eliminate the possibility that the informant's conclusions are based on unjustified speculation or rumor of the defendant's general reputation. "What should be required, then before details are characterized as self-verifying, is that *the facts detailed are incriminating facts rather than innocent facts*." W. LaFave, 1 *Search and Seizure* 675 (1978). The affidavit in this case, does not meet the "totality of the circumstances" set out in *Gates, supra,* nor does it meet either prong of the *Aguilar-Spinelli* test. The affidavit is, therefore, insufficient, and cannot be used to support probable cause. Because the Court of Criminal Appeals erred in affirming the Circuit Court of Montgomery County, the Defendant's conviction is due to be reversed.

IN THE SUPREME COURT OF ALABAMA

S.C. NO. _____

EX PARTE:

DENNIS RAY SUMNER,
Petitioner,

IN RE:

DENNIS RAY SUMNER,
Appellant,

vs.

THE STATE OF ALABAMA,
Appellee.

Case No. CC-88-1405-PH
On Appealed from Montgomery County Circuit Court
Fifteenth Judicial Circuit of Alabama

BRIEF OF APPELLANT FOR PETITION FOR WRIT OF CERTIORARI

DAVID S. LUKER
ATTORNEY FOR APPELLANT
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

ARGUMENT

ISSUE ONE

DID THE COURT OF CRIMINAL APPEALS ERR BY AFFIRMING THE LOWER COURT WHO DID NOT ALLOW THE DEFENDANT AND HIS COUNSEL ADEQUATE OPPORTUNITY TO CONSULT OUTSIDE OF THE PRESENCE OF THE VENIRE PRIOR TO STRIKING THE JURY?

The Defendant, Dennis Ray Sumner, was denied his right to Due Process, Equal Protection and a Fair Trial by an impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the Constitution of the State of Alabama. Mr. Sumner was not able to participate in his own defense and his counsel was not allowed to effectively assist him during jury selection, a violation of the Sixth Amendment of the Constitution of the United States.

After voir dire and before striking the jury, the Defendant's counsel asked for a few minutes outside of the presence of the venire to discuss potential strikes with the Defendant. The request was denied and the Judge forced the defendant's lawyer to strike the jury. Before the jury was impaneled, Mr. Sumner's counsel made a motion for a mistrial which was overruled (Vol. I, RT-3 to RT-6).

> Mr. Luker: At this time, I'd like to make a motion for a mistrial on the grounds that my client has been denied his right to due process under the Fifth and Sixth Amendments to the Alabama Constitution and the U.S. Constitution, and the Fourteenth Amendment of the U.S. Constitution in that he was denied effective assistance of counsel during the jury selection. He did not have an opportunity to consult with me nor me with him after the Court finished asking the questions. We had no time whatsoever to go over the information we had derived from I believe it was a venire of 40 at that time. We didn't have time to discuss it or him take part in his defense. . . . He didn't have an oppor-

tunity to discuss with me or take part in his defense, nor me inner-act with him concerning the selection. . . .

The Court: You had ample opportunity to discuss as long as you wanted to looking straight at the jury. . . .

Mr. Luker: I am suggesting that having to look eyeball to eyeball to the jury not ten feet away and discuss over a period of whatever time we were allowed, the selections in the presence of the jury impeded our ability to have an attorney-client relationship.

The Court: Overruled.

Mr. Sumner was prohibited from have an effective and meaningful attorney-client relationship because the venire was sitting only a few feet away from him, and he and his attorney had to discuss potential strikes within hearing distance of the venire. Mr. Sumner could not openly discuss the issues about the venire without the possibility of prejudicing potential jurors that could overhear their discussions. The venire could see and hear everything that went on between Mr. Sumner and his attorney regarding positive and negative reactions elicited from the venire during voir dire.

The right of the accused to assistance of counsel includes the right to assistance of counsel from the time of arraignment until the beginning of trial for the purposes of consultation, investigation, and preparation for trial. *Powell v. State of Alabama,* 287 U.S. 45, 53 S.Ct. 55 (1932). Mr. Sumner was denied effective assistance of counsel dury jury selection. Any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. *Crutchfield v. Wainwright,* 803 F.2d 1103 (11th Cir. 1983). In *Crutchfield, id,* the trial court instructed the defendant not to talk with his counsel during the defendant's testimony. The length of the recess was in dispute, but because Crutchfield's counsel did not object, move for a mistrial, or ask to discuss nontestimonial aspects of the case with his client, the Eleventh Circuit held that Crutchfield was not deprived of the right to assistance of counsel. The court did, however, reaffirm the rationale of *United States v. Conway,* 632 F.2d 641 (5th Cir.

Unit B 1980) and *United States v. Romano,* 736 F.2d 1432 (11th Cir. 1984) in holding that any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. "Where *actual or constructive* denial of assistance of counsel occurs a per se rule of prejudice applies." *Crutchfield, supra,* citing *Chadwick v. Green,* 740 F.2d at 900 n.3 (11th Cir. 1984) (emphasis added). Mr. Sumner was denied the effective assistance of counsel during jury selection. His attorney expressed a desire to confer privately with his client and that request was made on the record. His request was denied and the jury was struck. Before the jury was impaneled, Mr. Sumner's counsel made a motion for a mistrial because his request to confer with Mr. Sumner was denied (Vol. I, RT-3 to RT-6). His motion was overruled and the jury was impaneled (Vol. I, RT-6).

Payne v. State, 421 So.2d 1303 (Ala.Cr.App. 1982) and *Ashurst v. State,* 424 So.2d 691 (Ala.Cr.App. 1982) are two cases following the per se rule of denial of assistance of counsel. In *Ashurst, id,* the Court of Criminal Appeals held that prohibiting defense counsel from talking to the defendant, once the defendant had started testifying, until such time as the defendant had completed his testimony, including all breaks and recesses, was an unconstitutional deprivation of the right to counsel. "The question presented is whether a restriction, however brief, on a criminal defendant's right to confer with counsel is tantamount to an unconstitutional deprivation of the right to counsel. We think it is." *Ashurst, supra,* citing *Payne, supra,* at 1305.

The two leading United States Supreme Court cases in this area are *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), and *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Geders, supra,* the Supreme Court held that the trial court's order preventing the defendant from consulting with his counsel about anything during a 17 hour overnight recess between his direct and cross-examination deprived the defendant of his right to the assistance of counsel guaranteed by the Sixth Amendment. The Court went on to say that "such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. . . . Our cases recognize that

the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Geders, supra,* at 1335.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

The lower court in *Geders, supra,* was deemed reversible error not merely because of the length of the denial, but also because it *occurred at a critical stage* of the proceedings. [Citing *Powell v. Alabama,* 287 U.S. 45, 68-89, 53 S.Ct. 55, 64, 77 L.Ed.2d 158, 170 (1932)]. In this case, Mr. Sumner was denied counsel prior to jury selection, which is certainly a critical stage. The purpose of voir dire is to elicit biased or prejudicial feelings from the venire so that a fair and impartial jury can be selected. Mr. Sumner was not allowed to openly discuss members of the venire with his counsel so that they could make tactical and strategical decisions regarding use of their strikes. The venire was sitting close enough to Mr. Sumner and his counsel that they could hear any discussions that Mr. Sumner and his attorney had. This not only inhibited Mr. Sumner and his counsel from having an attorney-client relationship, but also prejudiced potential jurors.

Cronic, supra, contrasted assistance of counsel to denial of counsel.

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries". Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail", as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be rep-

> resented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."

Cronic, supra, at 2043-2044.

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. . . .* Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. (emphasis added).

Cronic, supra, at 2046-2047. *Crutchfield, supra,* followed *Cronic, supra,* and *Geders, supra,* in holding that any deprivation of assistance of counsel constitutes reversible error, and necessitates a new trial. Deprivation of counsel is per se unconstitutional and no prejudice need to be shown. Because Mr. Sumner was denied assistance of counsel at a critical stage of the proceedings, his conviction is due to be reversed.

ARGUMENT

ISSUE TWO

DID THE COURT OF CRIMINAL APPEALS ERR BY AFFIRMING THE LOWER COURT WHO OVERRULED THE DEFENDANTS MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT?

A search warrant can only be issued based on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and place to be searched. *Code of Alabama,* Section 15-5-3 (1975). The affidavit must state sufficient *specific facts or circumstances* to support a finding of probable cause. *Alford v. State,* 381 So.2d 203 (1980); *Tyler v. State,* 45 So.2d 442 (1969); *Brandeis v.*

State, 219 So.2d 404 (1968); *Brown v. State*, 167 So.2d 281 (1964). An affidavit that is based primarily on information received from an informant must meet additional requirements. These standards are set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The "*Aguilar-Spinelli* two-pronged test" requires that (1) the underlying circumstances reveal the basis of the informants knowledge that certain persons had been, was or would be involved in criminal activities or that evidence of the crime could be found where he said they would be found, and (2) that the underlying circumstances give cause to believe that the informant is a credible person or that his information is reliable. In 1983, the United States Supreme Court formulated a more flexible standard for evaluating the facial sufficiency of an affidavit based on an informant tip. The *Gates, supra*, "totality of the circumstances" test replaces the more rigid two-pronged test of *Aguilar, supra*, and *Spinelli, supra*.

> The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge"* of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gates, supra, at 2332 [quoting *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960)] (emphasis added). Although *Gates, supra*, relaxed the standards for probable cause determination, it is clear that the *Aguilar-Spinelli* analysis has not been eliminated from the factors that the magistrate must consider. "Though an informant's 'veracity' and 'basis of knowledge' are no longer to be understood as entirely separate and independent requirements, they are still 'highly relevant' in determining whether probable cause exists." *Gates, supra*, at 2237. *Gates, supra*, therefore, abandoned only the strict application of the old test, *not* the substance of veracity, reliability and basis of knowledge.

When the *Gates* "totality of the circumstances" test is applied to the facts in Mr. Sumner's case, it is clear that the affidavit does not meet the probable cause necessary for issuing a search warrant. The affidavit in this case is based upon an anonymous phone call made to the Montgomery, Alabama Police Department on March 28, 1988 (Supp. Rec., RT-7). The unidentified anonymous caller reported information to Detective David Byrd regarding the Defendant, Dennis Sumner. The informant did not identify himself or say that he had ever bought drugs from Mr. Sumner (Supp. Rec., RT-8 to RT-9). The anonymous caller had not been used before he called on March 28, 1988, and the police have not talked to him since (Supp. Rec. RT-10 and RT-15). The information the caller gave to the police was very general in nature and he did not indicate how he had obtained his information. (Supp. Rec., RT-12 to RT-13; RT-14 to RT-15). The affidavit basically consisted of eight paragraphs:

1. On March 26, 1988, Dennis Sumner returned from somewhere in South Carolina with approximately 4 kilograms of Cocaine and an undetermined amount of Marijuana;
2. The caller stated Sumner would return to his trailer, which is described as a brown trailer, and gave the following directions to the trailer: enter Village West, take the first left in front of the office, go around the curve, take the second right into the court, Sumner's trailer is the last brown trailer on the right side of the street.
3. The caller stated that Sumner goes by the nickname "Skeet", and is an ex-felon from South Carolina for drug violations.
4. The caller stated that Sumner owns a black Monte Carlo with South Carolina license plates.
5. The caller stated that Sumner is a white male, 5'08 to 5'09, 150 to 155 pounds, gray hair and gray bread, with a tattoo on his right arm.
6. The caller stated that Sumner is unemployed.
7. The caller stated a white female, Ramona Hubler, lives with Sumner, and described Ramona Hubler, as being about 22 years of age, with black curly hair.

8. The caller stated that Sumner stores drugs in the back bedroom of his residence. The caller stated Sumner stores cocaine in a brown suitcase and that Sumner stores marijuana in cooler(s). The caller described the coolers as being blue and white as well as red and white in color. The caller also stated that Sumner stores a set of triple beam scales in the back bedroom.

Other than the information in paragraphs 1 and 8, the rest of the information is not relevant to the issue. The affidavit does not state that the informant had personal knowledge, how he came to know the information, or his connection with Mr. Sumner. There is no basis of knowledge or underlying circumstances showing how the informant obtained his information or how he concluded that Mr. Sumner was engaged in criminal activity. "The mere assertion that the informant speaks from personal knowledge *without a factual basis or data illustrative of that conclusion* is not sufficient." *United States v. Long*, 142 U.S.App.D.C. 118, 439 F.2d 628 (1971); *Channell v. State*, 477 So.2d 522 (Ala.Cr.App. 1985); and *Hatton v. State*, 359 So.2d 822 (Ala.Cr.App. 1977) (emphasis added). Anyone who casually knew Mr. Sumner could have told the police what he looks like, where he lives and what kind of car he drives. There is no basis for the information in paragraph 1. The fact that Mr. Sumner's car had South Carolina tags on it could be used to presume that he had "returned from somewhere in South Carolina". The caller did not say that he had seen the drugs, tried to buy some of the drugs, or even knew what drugs looked like. Conclusions or presumptions made by an informant are inadequate to support probable cause. *Spinelli, supra*, hold that self-verifying details may be enough to overcome the lack of a basis of knowledge.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in *sufficient detail* that the magistrate may know that he is relying on *something more substantial than a casual rumor circulating in the underworld or an accusation based merely on a individual's general reputation.* (emphasis added).

In Mr. Sumner's case, however, self-verifying detail is missing. General innocent information is not enough to overcome the lack of a basis of knowledge. The tip is conclusory only, not supported by any factual basis. "The mere conclusion of an informant is not sufficient to establish probable cause. The informant must have some basis for the conclusion, and he must relate that basis to the law enforcement officer." *Roberson v. State,* 340 So.2d 459 (1976).

The information relayed in paragraph 8 is a description of the area where Mr. Sumner allegedly "stores drugs". This general allegation does not speak to the time when drugs were stored there, so there is no nexus tying the alleged crime to the tip. *Stikes v. State,* 397 So.2d 178 (Ala.Cr.App. 1981). When the information given has no connection with the date of the issuance of the warrant there is no existing present cause to support a warrant. Vagueness of the time element is fatal in affidavits supporting search warrants. *Walker v. State,* 275 So.2d 724 (Ala.Cr.App. 1973); *Keller v. State,* 305 So.2d 402 (Ala.Cr.App. 1974). In order to support a search warrant, the proof supplied must speak as of the time of the issuance of the warrant. *Sgro v. United States,* 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed.2d 260, 263 (1932); *Reese v. State,* 456 So.2d 341 (Ala.Cr.App. 1982); *Travis v. State,* 381 So.2d 97, 100 (Ala.Cr.App. 1979), *cert. denied,* 381 So.2d 102 (Ala. 1980). Not only is the tip supplied here vague in time, but it also speaks in a tense that does not tie it to the particular transaction in question. Although the caller had apparently been in Mr. Sumner's trailer at some point in time, there is no indication of when, nor is there any showing that he had seen drugs in the trailer Mr. Sumner's alleged return from South Carolina, the transaction upon which the warrant is based.

Mr. Luker: Other than the statement in paragraph 8 of your affidavit, the informant gave you no information concerning when he saw drugs at 318 Cardinal Court; did he?

Detective Byrd: That's correct.

Mr. Luker: And he didn't tell you he had seen drugs that had been transported from South Carolina to 318 Cardinal Court; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you how he knew that to be a fact; did he?

Detective Byrd: That's a fact.

Mr. Luker: That's a fact meaning he did not tell you how he knew?

Detective Byrd: Yes, he did not tell me.

Mr. Luker: He did not tell you?

Detective Byrd: He did not tell me how he knew that drugs were being transported from South Carolina.

(Supp. Rec., RT-12 to RT-13). Because there is no showing that the informant knew of drugs being stored in Mr. Sumner's trailer at the time in question, the warrant is defective.

Mr. Luker: Besides the transporation he had no basis to tell you, he didn't tell you how he knew that in Paragraph 8?

Detective Byrd: Those facts that you've mentioned, his employment, who lived with him, they gave me no cause to suspect criminal activity.

Mr. Luker: So other than the fact that the informant told you that Mr. Sumner returned two days previous from South Carolina with drugs, and that he stored drugs in the back bedroom, you had no other information concerning Mr. Sumner and any possible violation of the law?

Detective Byrd: That is all that the caller told me that would give me any information about Mr. Sumner's criminal activity.

Mr. Luker: And on those two points, the caller did not tell you how he knew that he returned from South Carolina with drugs; he did not tell you that he was a participant in that transportation of drugs; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that he had seen drugs in that car; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that Mr. Sumner told him he was bringing drugs back; did he?

Detective Byrd: No.

Mr. Luker: Now, as to the drugs in the house, he did not tell you that he had been in the house and seen drugs that were returned from South Carolina in that house?

Detective Byrd: No.

Mr. Luker: Did the informant tell you the most recent time he had been in the house?

Detective Byrd: No, he didn't.

(Supp. Rec., RT-13 to RT-14).

Mr. Luker: The informant did not tell you that he had been in the house since the drugs had been brought back from South Carolina; did he?

Detective Byrd: No.

(Supp. Rec., RT-15).

> We conclude that a combination of *undated, conclusory information* from an anonymous source and an *undated general allegation of personal observation* by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate. . . . Police officers have long been accustomed to the importance of time; to their credit, the overwhelming majority of affidavits have honored the requirement.

Davis v. State, 237 So.2d 635 (1969) at 639 (quoting *Rosencranz v. United States*, 1 Cir., 356 F.2d 310). Although the affidavit need not state the exact time the informant observed the offense, the affidavit in this case fails to state any time at all when the caller observed the alleged transaction. "Absent fresh information, the likelihood that illegal contraband is still on the premises becomes too remote to support a finding of probable cause," *Keller, supra*, at 404.

The credibility and reliability of the informant are clearly lacking in this case. There is no showing of past performance by the informant nor did he incriminate himself in any way. (Supp. Rec., RT-15). The informant, then, had no past

performance or indicia of reliability. When an unknown or questionable informer is used, as here, his tip may be corroborated to establish probable cause for the issuance of the warrant. *Rickman v. State,* 361 So.2d 22 (Ala.Cr.App. 1978); *Hatton supra; Attorney General v. State,* 286 Ala. 117, 237 So.2d 640 (1970). The corroboration, however, must be of incriminating details and not general innocent information. *Waters v. State,* 360 So.2d 347 (Ala.Cr.App. 1978); *Murray v. State,* 396 So.2d 125 (Ala.Cr.App. 1981). In this affidavit, the Narcotics and Intelligence Bureau only corroborated innocent details such as Mr. Sumner's address, his automobile, the establishment of a power account and a cursory NCIC computer check. No corroboration was made of any incriminating details, so there was nothing in this case beyond mere *suspicion* that Mr. Sumner might have had drugs in his possession. That is an insufficient nexus between the corroborated details and the alleged crime. There is nothing to negate the chance that the informer is, for his own reasons, pointing to an innocent man. *Stikes, supra.*

The Court of Criminal Appeals' recent decision in *Jordan v. State,* 549 So.2d 161 (Ala.Cr.App. 1989), is relevant to the issues here. In *Jordan, supra,* an anonymous caller informed the Mobile Police Department that:

> "an early '70 model GMC Jimmy bearing California's license plates was heading eastbound from the Mobile area to Florida"; that it was occupied by a white male named Allen Jordan and a white female named Karen Jordan; that they possessed approximately a pound of marijuana and a powder substance known as "methamphetamine or speed"; that they had in their possession several pistols and "some long guns, rifles, and shotguns"; and that one of the persons was "carrying a gun on or about his person where he could reach it."

The information was immediately relayed by the radio to the state police and a roadblock was set up. Jordan was subsequently arrested and convicted and he appealed his conviction in part, based on the informant's tip. The Court of Criminal Appeals held that:

> The information from the informant, standing alone, did not supply probable cause. The innocent facts supplied by the informant could have been available to anyone, and the facts, innocent and otherwise, were insufficient to conclude that the informant had access to accurate and reliable information about illegal activity.

Jordan, supra, is similar to Mr. Sumner's case, and Mr. Sumner's conviction should be reversed based on the decision of the Court of Criminal Appeals.

Horzempa v. State, 290 So.2d 217 (1973), had a much stronger showing of reliability and credibility than Mr. Sumner's case does. In *Horzempa, id,* however, the warrant *still failed* because it lacked sufficient underlying circumstances to establish probable cause. Two different reliable informants had been in the defendant's residence of several occasions and had made numerous drug buys for the affiant over a space of two weeks, the last of which was three days preceding the warrant. Both informants stated that the drugs were in the defendant's house. The Supreme Court of Alabama held that the information given was insufficient to support probable cause for a search warrant.

> But the instant affidavit . . . does not state how the informants learned of the drugs being in the house. Nor does it show how they arrived at the statement as to the presence of the drugs being there "now". Nor does it show whether the informants saw, touched, smelled, bought, or otherwise came in contact with the drugs on the several "recent" occasions when they were in the residence.

Neugent v. State, 340 So.2d 43, 49 (1975) (quoting *Horzempa*). If the information provided in *Horzempa, supra,* is insufficient, then the information in Mr. Sumner's case is certainly not enough to support probable cause.

The trial court found the case of *Bishop v. State,* 518 So.2d 829 (Ala.Cr. App. 1987), to be controlling. (Vol. II, CR-56). *Bishop, id,* however, has some additional facts that are not present in Mr. Sumner's case. In addition to verifying innocuous information, the police in *Bishop, supra,* began a

surveillance on the defendant's residence. A known drug offender, Neece, was seen going in and out of the defendant's residence, and after he exited the house he was subsequently stopped and cocaine was found in his possession which had been purchased with marked currency supplied by the Mobile County Sheriff's Department. This type of corroboration is certainly more valuable and reliable in supporting probable cause than that in Mr. Sumner's case. *Bishop, supra,* then, is not controlling as the trial court held.

In Mr. Sumner's case, the affidavit is void of any facts from which a magistrate could reasonably conclude that the informant is credible or that his information is reliable. There is no allegation of the previous reliability of this informant. No underlying facts were provided demonstrating the credibility of the informant or the basis of his knowledge. There was no nexus between the particular transaction upon which the warrant was issued and the informant's tip. The "tip" provided nothing more than a conclusion or rumor that Mr. Sumner was engaging in "suspect" activities. When there is no basis of knowledge, even elaborate detail is insufficient because it does not eliminate the possibility that the informant's conclusions are based on unjustified speculation or rumor of the defendant's general reputation. "What should be required, then before details are characterized as self-verifying, is that *the facts detailed are incriminating facts rather than innocent facts*." W. LaFave, 1 *Search and Seizure* 675 (1978). The affidavit in this case, does not meet the "totality of the circumstances" set out in *Gates, supra,* nor does it meet either prong of the *Aguilar-Spinelli* test. The affidavit is, therefore, insufficient, and cannot be used to support probable cause.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

3rd Div. 81

Montgomery Circuit Court
CC 88-1405-PH

DENNIS RAY SUMNER
Appellant

vs.

State of Alabama
Appellee

You are hereby notified that on November 17, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing **overruled**. Rule 39(k), A.R.A.P., motion **denied**. **No Opinion**. Judgment not final, see Rules 39 and 41, A.R.A.P.

/s/ Mollie Jordan

CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

A-36

IN THE
COURT OF CRIMINAL APPEALS OF ALABAMA

3 DIV. 81

STATE OF ALABAMA

Plaintiff/Appellee,

vs.

DENNIS RAY SUMNER

Defendant/Appellant

Case No. CC-88-1405-PH
Appealed from Montgomery County Circuit Court
Fifteenth Judicial Circuit of Alabama

APPLICATION FOR REHEARING AND 39(K) MOTION

DAVID S. LUKER
TAMERA K. ERSKINE
ATTORNEYS FOR APPELLANT
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

TO THE HONORABLE PRESIDING JUDGE AND ASSOCIATE JUDGES OF THE COURT OF CRIMINAL APPEALS OF ALABAMA:

Comes now the Appellant, Dennis Ray Sumner, in the above styled cause, by and through his undersigned counsel, and moves this Honorable Court to render unto him a rehearing in said cause, and to set aside, annul, and hold for naught the judgment heretofore rendered on to wit: September 29, 1988, wherein this Honorable Court affirmed *without opinion*, the judgment of the Circuit Court of Montgomery County, Alabama, and to enter an Order reversing said judgment below, which denied Sumner a fair trial, due to the trial court's not allowing the Defendant and his counsel adequate opportunity to consult outside the presence of the venire prior to striking the jury; overruling the Defendant's Motion to Suppress evidence seized pursuant to the search warrant; and overruling the Defenant's Motion for Judgment of Acquittal because the State failed to prove a prima facie case.

"A"

MOTION TO ADD OR CORRECT FACTS PURSUANT TO RULE 39(K) OF THE ALABAMA RULES OF APPELLATE PROCEDURE

Pursuant to Rule 39(k) of the *Alabama Rules of Appellate Procedure,* Sumner moves this Honorable Court to accept the following facts, or otherwise state facts in evidence presented upon rehearing, or in the alternative, to accept the facts in evidence as those facts related to the matter of the raised, but omitted, Constitutional issues sought to be reviewed upon submission of the Briefs of the parties:

> On March 28, 1988, an anonymous caller telephoned the Narcotics and Intelligence Bureau of the Montgomery, Alabama Police Department, and reported information concerning controlled substances being kept at 318 Cardinal Court, Montgomery, Alabama. As a result of the information obtained from the anonymous caller, a search warrant

was issued and executed on the residence. Various controlled substances were seized pursuant to the search warrant, and the Defendant, Mr. Sumner, was arrested. Mr. Sumner was indicted on June 3, 1988, by the Montgomery County Grand Jury (Vol. II, CR-6 to CR-9). A Suppression Hearing was held on August 22, 1988, at which time the Defendant's Motion to Suppress Evidence obtained pursuant to the search warrant was denied. (Supp. Record, RT-2 to RT-33; Vol. II, CR-55 to CR-56). The case was tried on August 29, 30, and 31, and on August 31, 1988, the jury returned a verdict of guilty of trafficking in cannabis, not guilty of possession of alprazolam, not guilty of possession of diazepam, guilty of possession of phentermine, and guilty of trafficking in cocaine (Vol. II, CR-10 to CR-14). During the Suppression Hearing testimony was elicited from Detective David Byrd, that the anonymous informant had not been used on previous occasions, nor had he been used since. The informant did not incriminate himself, or say that he had seen the drugs at the residence since they had allegedly been brought back from South Carolina (Vol. II, RT-15). Detective Byrd testified at trial that at the time the search warrant was executed, three people were found at the residence. They were the Defendant, Mr. Sumner; a female, Ramona Hubler; and another female, Vickie Beto (Vol. I, RT-10). None of these three people were found in or near the back bedroom, where the drugs were recovered (Vol. I, RT-10 to RT-11, RT-15, RT-19). At the close of the State's case, the Defendant made a Motion for a Judgment of Acquittal on the grounds that the State had failed to prove a prima facie case. The Defendant's motion was denied (Vol. I, RT-161). The Defendant was convicted of trafficking in cannabis, possession of phentermine, and trafficking in cocaine (Vol. II, CT-10, CR-13, CR-14). Mr. Sumner was found not guilty of possession of alprazolam, and not guilty of possession of diazepam (Vol. II, CR-11 and CR-12). Mr. Sumner was sentenced on September 13, 1988, and gave Notice of Appeal on September 17, 1988 (Vol. II, CR-65 and CR-66).

"B"

Pursuant to Rule 40 of the *Alabama Rules of Appellate Procedure*, and the decision of this Honorable Court in *Cox v. State*, 380 So.2d 384 (Ala.Cr.App. 1980), Sumner resubmits his original brief for consideration in support of his Application for Rehearing by reassigning the issues raises on appeal as argued in the Appellant's original brief on submission.

Sumner asserts that the issue raised in Section I of his Brief on Appeal, but not addressed by the this Honroable Court because of the affirmance *without opinion*, is in direct conflict with the opinions of the Supreme Court of the United States in *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932); *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1987). Sumner asserts that the affirmance *without opinion* is also in direct conflict with the Eleventh Circuit and former Fifth Circuit opinions in *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986); *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984); and *United States v. Conway*, 632 F.2d 641 (5th Cir. Unit B, 1980); and *Chadwick v. Green*, 740 F.2d at 900 (11th Cir. 1984). The affirmance *without opinion* is also in direct conflict with the Honorable Court of Criminal Appeals' opinion in *Payne v. State*, 421 So.2d 1303 (Ala.Cr.App. 1982), and *Ashurst v. State*, 424 So.2d 691 (Ala.Cr.App. 1982).

In support of his argument that the trial court did not allow the Defendant and his counsel adequate opportunity to consult outside of the presence of the venire prior to striking a jury, the Defendant attaches a copy of his original Brief on Appeal.

"C"

Sumner asserts that issues raised in Section II of his Brief on Appeal, but not addressed by this Honorable Court because of the affirmance *without opinion* is in direct conflict with the opinion of the Supreme Court of the United States in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89

S.Ct. 584, 21 L.Ed.2d 637 (1969); *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960); and *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed.2d 260 (1932). Sumner asserts that the affirmance without opinion is also in direct conflict with the *Code of Alabama*, Section 15-5-3 (1975), and with the Alabama Supreme Court's opinions in *Alford v. State*, 381 So.2d 203 (1980); *Tyler v. State*, 45 So.2d 442 (1969); *Brandeis v. State*, 219 So.2d 404 (1968); *Brown v. State*, 167 So.2d 281 (1964); *Roberson v. State*, 340 So.2d 459 (1976); *Davis v. State*, 237 So.2d 635 (1969); *Attorney General v. State*, 286 Ala. 117, 237 So.2d 640 (1970); *Horzempa v. State*, 290 So.2d 217 (1973); and *Neugent v. State*, 340 So.2d 43 (1975). Sumner asserts that the affirmance *without opinion* is in direct conflict with the Honorable Court of Criminal Appeals's opinion in *Channell v. State*, 477 So.2d 522 (Ala.Cr. App. 1985); *Hatton v. State*, 359 So.2d 822 (Ala.Cr.App. 1977); *Stikes v. State*, 397 So.2d 178 (Ala.Cr.App. 1981); *Walker v. State*, 275 So.2d 724 (Ala.Cr.App. 1973); *Keller v. State*, 305 So.2d 402 (Ala.Cr.App. 1974); *Reese v. State*, 456 So.2d 341 (Ala.Cr.App. 1982); *Travis v. State*, 381 So.2d 97 (Ala.Cr.App. 1979) *cert. denied*, 381 So.2d 102 (Ala. 1980); *Rickman v. State*, 361 So.2d 22 (Ala.Cr.App. 1978); *Waters v. State*, 360 So.2d 347 (Ala.Cr.App. 1978); and *Murray v. State*, 396 So.2d 125 (Ala.Cr.App. 1981).

In support of his arguments, the Defendant attaches his original Brief on Appeal.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

3rd Div. 81

Montgomery Circuit Court
CC 88-1405-PH

DENNIS RAY SUMNER
Appellant

vs.

State of Alabama
Appellee

You are hereby notified that on September 29, 1989 the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Affirmed on appeal. **No opinion**. Judgment not final, see Rules 40 and 41, A.R.A.P.

/s/ Mollie Jordan

CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

IN THE
COURT OF CRIMINAL APPEALS OF ALABAMA

3 DIV. 81

STATE OF ALABAMA

Plaintiff/Appellee,

vs.

DENNIS RAY SUMNER

Defendant/Appellant

Case No. CC-88-1405-PH
Appealed from Montgomery County Circuit Court
Fifteenth Judicial Circuit of Alabama

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

DAVID S. LUKER
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ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR BY NOT ALLOWING THE DEFENDANT AND HIS COUNSEL ADEQUATE OPPORTUNITY TO CONSULT OUTSIDE OF THE PRESENCE OF THE VENIRE PRIOR TO STRIKING THE JURY?

The Defendant, Dennis Ray Sumner, was denied his right to Due Process, Equal Protection and a Fair Trial by an impartial jury under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the Constitution of the State of Alabama. Mr. Sumner was not able to participate in his own defense and his counsel was not allowed to effectively assist him during jury selection, a violation of the Sixth Amendment of the Constitution of the United States.

After voir dire and before striking the jury, the Defendant's counsel asked for a few minutes outside of the presence of the venire to discuss potential strikes with the Defendant. The request was denied and the Judge forced the Defendant's lawyer to strike the jury. The next day, before the jury was impaneled, Mr. Sumner's counsel made a motion for a mistrial which was overruled (Vol. I, RT-3 to RT-6).

> Mr. Luker: At this time, I'd like to make a motion for a mistrial on the grounds that my client has been denied his right to due process under the Fifth and Sixth Amendments to the Alabama Constitution and the U.S. Constitution, and the Fourteenth Amendment of the U.S. Constitution in that he was denied effective assistance of counsel during the jury selection. He did not have an opportunity to consult with me nor me with him after the Court finished asking the questions. We had no time whatsoever to go over the information we had derived from I believe it was a venire of 40 at that time. We didn't have time to discuss it or him take part in his defense. . . . He didn't have an oppor-

tunity to discuss with me or take part in his defense, nor me inner-act with him concerning the selection. . . .

The Court: You had ample opportunity to discuss as long as you wanted to looking straight at the jury. . . .

Mr. Luker: I am suggesting that having to look eyeball to eyeball to the jury not ten feet away and discuss over a period of whatever time we were allowed, the selections in the presence of the jury impeded our ability to have an attorney-client relationship.

The Court: Overruled.

Mr. Sumner was prohibited from have an effective and meaningful attorney-client relationship because the venire was sitting only a few feet away from him, and he and his attorney had to discuss potential strikes within hearing distance of the venire. Mr. Sumner could not openly discuss the issue about the venire without the possibility of prejudicing potential jurors that could overhear their discussions. The venire could see and hear everything that went on between Mr. Sumner and his attorney regarding positive or negative reactions elicited from the venire during voir dire.

The right of the accused to assistance of counsel includes the right to assistance of counsel from the time of arraignment until the beginning of trial for the purposes of consultation, investigation, and preparation for trial. *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55 (1932). Mr. Sumner was denied effective assistance of counsel during jury selection. Any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1983). In *Crutchfield, id*, the trial court instructed the defendant not to talk with his counsel during the defendant's testimony. The length of the recess was in dispute, but because Crutchfield's counsel did not object, move for a mistrial, or ask to discuss non-testimonial aspects of the case with his client, the Eleventh Circuit held that Crutchfield was not deprived of the right to assistance of counsel. The court did, however, reaffirm the rationale of *United States v. Conway*, 632 F.2d 641 (5th Cir.

Unit B 1980) and *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984) in holding that any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. "Where *actual or constructive* denial of assistance of counsel occurs a per se rule of prejudice applies." *Crutchfield, supra*, citing *Chadwick v. Green*, 740 F.2d at 900 n.3 (11th Cir. 1984) (emphasis added). Mr. Sumner was denied the effective assistance of counsel during jury selection. His attorney expressed a desire to confer privately with his client and that request was made on the record. His request was denied and the jury was struck. Before the jury was impaneled, Mr. Sumner's counsel made a motion for a mistrial because his request to confer with Mr. Sumner was denied (Vol. I, RT-3 to RT-6). His motion was overruled and the jury was impaneled (Vol. I, RT-6).

Payne v. State, 421 So.2d 1303 (Ala.Cr.App. 1982) and *Ashurst v. State*, 424 So.2d 691 (Ala.Cr.App. 1982) are two cases following the per se rule of denial of assistance of counsel. In *Ashurst, id*, the Court of Criminal Appeals held that prohibiting defense counsel from talking to the defendant, once the defendant had started testifying, until such time as the defendant had completed his testimony, including all breaks and recesses, was an unconstitutional deprivation of the right to counsel. "The question presented is whether a restriction, however brief, on a criminal defendant's right to confer with counsel is tantamount to an unconstitutional deprivation of the right to counsel. We think it is." *Ashurst, supra*, citing *Payne, supra*, at 1305.

The two leading United States Supreme Court cases in this area are *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), and *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In *Geders, supra*, the Supreme Court held that the trial court's order preventing the defendant from consulting with his counsel about anything during a 17 hour overnight recess between his direct and cross-examination deprived the defendant of his right to the assistance of counsel guaranteed by the Sixth Amendment. The Court went on to say that "such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. . . . Our cases recognize that

the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." *Geders, supra,* at 1335.

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [A defendant] is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he [may] have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Geders, supra, citing *Powell v. Alabama,* 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed.2d 158, 170 (1932). *Geders, supra,* was deemed reversible error not merely because of the length of the denial, but also because it *occurred at a critical stage* of the proceedings. In this case, Mr. Sumner was denied counsel prior to jury selection, which is certainly a critical stage. The purpose of voir dire is to elicit biased or prejudicial feelings from the venire so that a fair and impartial jury can be selected. Mr. Sumner was not allowed to openly discuss members of the venire with his counsel so that they could make tactical and strategical decisions regarding use of their strikes. The venire was sitting close enough to Mr. Sumner and his counsel that they could hear any discussions that Mr. Sumner and his attorney had. This not only inhibited Mr. Sumner and his counsel from having an attorney-client relationship, but also prejudiced potential jurors.

Cronic, supra, contrasted assistance of counsel to denial of counsel.

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries". Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail", as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it

> affects his ability to assert any other rights he may have."

Cronic, supra, at 2043-2044.

> There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. . . .* Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. (emphasis added).

Cronic, supra, at 2046-2047. *Crutchfield, supra,* followed *Cronic, supra,* and *Geders, supra,* in holding that any deprivation of assistance of counsel constitutes reversible error and necessitates a new trial. Deprivation of counsel is per se unconstitutional and no prejudice need to be shown. Because Mr. Sumner was denied assistance of counsel at a critical stage of the proceedings, his conviction is due to be reversed.

ARGUMENT

ISSUE TWO

DID THE TRIAL COURT ERR BY OVERRULING THE DEFENDANTS MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT?

A search warrant can only be issued based on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and place to be searched. *Code of Alabama,* Section 15-5-3 (1975). The affidavit must state sufficient *specific facts or circumstances* to support a finding of probable cause. *Alford v. State,* 381 So.2d 203 (1980); *Tyler v. State,* 45 So.2d 442 (1969); *Brandeis v.*

State, 219 So.2d 404 (1968); *Brown v. State*, 167 So.2d 281 (1964). An affidavit that is based primarily on information received from an informant must meet additional requirements. These standards are set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). The "*Aguilar-Spinelli* two-pronged test" requires that (1) the underlying circumstances reveal the basis of the informants knowledge that certain persons had been, was or would be involved in criminal activities or that evidence of the crime could be found where he said they would be found, and (2) that the underlying circumstances give cause to believe that the informant is a credible person or that his information is reliable. In 1983, the United States Supreme Court formulated a more flexible standard for evaluating the facial sufficiency of an affidavit based on an informant tip. The *Gates, supra*, "totality of the circumstances" test replaces the more rigid two-pronged test of *Aguilar, supra*, and *Spinelli, supra*.

> The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, *including the "veracity" and "basis of knowledge"* of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gates, supra, at 2332 [quoting *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960)] (emphasis added). Although *Gates, supra*, relaxed the standards for probable cause determination, it is clear that the *Aguilar-Spinelli* analysis has not been eliminated from the factors that the magistrate must consider. "Though an informant's 'veracity' and 'basis of knowledge' are no longer to be understood as entirely separate and independent requirements, they are still 'highly relevant' in determining whether probable cause exists." *Gates, supra*, at 2237. *Gates, supra*, therefore, abandoned only the strict application of the old test, *not* the substance of veracity, reliability and basis of knowledge.

When the *Gates* "totality of the circumstances" test is applied to the facts in Mr. Sumner's case, it is clear that the affidavit does not meet the probable cause necessary for issuing a search warrant. The affidavit in this case is based upon an anonymous phone call made to the Montgomery, Alabama Police Department on March 28, 1988 (Supp. Rec., RT-7). The unidentified anonymous caller reported information to Detective David Byrd regarding the Defendant, Dennis Sumner. The informant did not identify himself or say that he had ever bought drugs from Mr. Sumner (Supp. Rec., RT-8 to RT-9). The anonymous caller had not been used before he called on March 28, 1988, and the police have not talked to him since (Supp. Rec. RT-10 and RT-15). The information the caller gave to the police was very general in nature and he did not indicate how he had obtained his information. (Supp. Rec., RT-12 to RT-13; RT-14 to RT-15). The affidavit basically consisted of eight paragraphs:

1. On March 26, 1988, Dennis Sumner returned from somewhere in South Carolina with approximately 4 kilograms of Cocaine and an undetermined amount of Marijuana;
2. The caller stated Sumner would return to his trailer, which is described as a brown trailer, and gave the following directions to the trailer: enter Village West, take the first left in front of the office, go around the curve, take the second right into the court, Sumner's trailer is the last brown trailer on the right side of the street.
3. The caller stated that Sumner goes by the nickname "Skeet", and is an ex-felon from South Carolina for drug violations.
4. The caller stated that Sumner owns a black Monte Carlo with South Carolina license plates.
5. The caller stated that Sumner is a white male, 5'08 to 5'09, 150 to 155 pounds, gray hair and gray bread, with a tattoo on his right arm.
6. The caller stated that Sumner is unemployed.
7. The caller stated a white female, Ramona Hubler, lives with Sumner, and described Ramona Hubler, as being about 22 years of age, with black curly hair.

> 8. The caller stated that Sumner stores drugs in the back bedroom of his residence. The caller stated Sumner stores cocaine in a brown suitcase and that Sumner stores marijuana in cooler(s). The caller described the coolers as being blue and white as well as red and white in color. The caller also stated that Sumner stores a set of triple beam scales in the back bedroom.

Other than the information in paragraphs 1 and 8, the rest of the information is not relevant to the issue. The affidavit does not state that the informant had personal knowledge, how he came to know the information, or his connection with Mr. Sumner. There is no basis of knowledge or underlying circumstances showing how the informant obtained his information or how he concluded that Mr. Sumner was engaged in criminal activity. "The mere assertion that the informant speaks from personal knowledge *without a factual basis or data illustrative of that conclusion* is not sufficient." *United States v. Long*, 142 U.S.App.D.C. 118, 439 F.2d 628 (1971); *Channell v. State*, 477 So.2d 522 (Ala.Cr.App. 1985); and *Hatton v. State*, 359 So.2d 822 (Ala.Cr.App. 1977) (emphasis added). Anyone who casually knew Mr. Sumner could have told the police what he looks like, where he lives and what kind of car he drives. There is no basis for the information in paragraph 1. The fact that Mr. Sumner's car had South Carolina tags on it could be used to presume that he had "returned from somewhere in South Carolina". The caller did not say that he had seen the drugs, tried to buy some of the drugs, or even knew what drugs looked like. Conclusions or presumptions made by an informant are inadequate to support probable cause. *Spinelli, supra*, hold that self-verifying details may be enough to overcome the lack of a basis of knowledge.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in *sufficient detail* that the magistrate may know that he is relying on *something more substantial than a casual rumor circulating in the underworld or an accusation based merely on a individual's general reputation.* (emphasis added).

In Mr. Sumner's case, however, self-verifying detail is missing. General innocent information is not enough to overcome the lack of a basis of knowledge. The tip is conclusory only, not supported by any factual basis. "The mere conclusion of an informant is not sufficient to establish probable cause. The informant must have some basis for the conclusion, and he must relate that basis to the law enforcement officer." *Roberson v. State*, 340 So.2d 459 (1976).

The information relayed in paragraph 8 is a description of the area where Mr. Sumner allegedly "stores drugs". This general allegation does not speak to the time when drugs were stored there, so there is no nexus tying the alleged crime to the tip. *Stikes v. State*, 397 So.2d 178 (Ala.Cr.App. 1981). When the information given has no connection with the date of the issuance of the warrant there is no existing present cause to support a warrant. Vagueness of the time element is fatal in affidavits supporting search warrants. *Walker v. State*, 275 So.2d 724 (Ala.Cr.App. 1973); *Keller v. State*, 305 So.2d 402 (Ala.Cr.App. 1974). In order to support a search warrant, the proof supplied must speak as of the time of the issuance of the warrant. *Sgro v. United States*, 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed.2d 260, 263 (1932); *Reese v. State*, 456 So.2d 341 (Ala.Cr.App. 1982); *Travis v. State*, 381 So.2d 97, 100 (Ala.Cr.App. 1979), *cert. denied*, 381 So.2d 102 (Ala. 1980). Not only is the tip supplied here vague in time, but it also speaks in a tense that does not tie it to the particular transaction in question. Although the caller had apparently been in Mr. Sumner's trailer at some point in time, there is no indication of when, nor is there any showing that he had seen drugs in the trailer Mr. Sumner's alleged return from South Carolina, the transaction upon which the warrant is based.

Mr. Luker: Other than the statement in paragraph 8 of your affidavit, the informant gave you no information concerning when he saw drugs at 318 Cardinal Court; did he?

Detective Byrd: That's correct.

Mr. Luker: And he didn't tell you he had seen drugs that had been transported from South Carolina to 318 Cardinal Court; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you how he knew that to be a fact; did he?

Detective Byrd: That's a fact.

Mr. Luker: That's a fact meaning he did not tell you how he knew?

Detective Byrd: Yes, he did not tell me.

Mr. Luker: He did not tell you?

Detective Byrd: He did not tell me how he knew that drugs were being transported from South Carolina.

(Supp. Rec., RT-12 to RT-13). Because there is no showing that the informant knew of drugs being stored in Mr. Sumner's trailer at the time in question, the warrant is defective.

Mr. Luker: Besides the transporation he had no basis to tell you, he didn't tell you how he knew that in Paragraph 8?

Detective Byrd: Those facts that you've mentioned, his employment, who lived with him, they gave me no cause to suspect criminal activity.

Mr. Luker: So other than the fact that the informant told you that Mr. Sumner returned two days previous from South Carolina with drugs, and that he stored drugs in the back bedroom, you had no other information concerning Mr. Sumner and any possible violation of the law?

Detective Byrd: That is all that the caller told me that would give me any information about Mr. Sumner's criminal activity.

Mr. Luker: And on those two points, the caller did not tell you how he knew that he returned from South Carolina with drugs; he did not tell you that he was a participant in that transportation of drugs; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that he had seen drugs in that car; did he?

Detective Byrd: No.

Mr. Luker: He did not tell you that Mr. Sumner told him he was bringing drugs back; did he?

Detective Byrd: No.

Mr. Luker: Now, as to the drugs in the house, he did not tell you that he had been in the house and seen drugs that were returned from South Carolina in that house?

Detective Byrd: No.

Mr. Luker: Did the informant tell you the most recent time he had been in the house?

Detective Byrd: No, he didn't.

(Supp. Rec., RT-13 to RT-14).

Mr. Luker: The informant did not tell you that he had been in the house since the drugs had been brought back from South Carolina; did he?

Detective Byrd: No.

(Supp. Rec., RT-15).

> We conclude that a combination of *undated, conclusory information* from an anonymous source and an *undated general allegation of personal observation* by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate. . . . Police officers have long been accustomed to the importance of time; to their credit, the overwhelming majority of affidavits have honored the requirement.

Davis v. State, 237 So.2d 635 (1969) at 639 (quoting *Rosencranz v. United States*, 1 Cir., 356 F.2d 310). Although the affidavit need not state the exact time the informant observed the offense, the affidavit in this case fails to state any time at all when the caller observed the alleged transaction. "Absent fresh information, the likelihood that illegal contraband is still on the premises becomes too remote to support a finding of probable cause," *Keller, supra*, at 404.

The credibility and reliability of the informant are clearly lacking in this case. There is no showing of past performance by the informant nor did he incriminate himself in any way. (Supp. Rec., RT-15). The informant, then, had no past

performance or indicia of reliability. When an unknown or questionable informer is used, as here, his tip may be corroborated to establish probable cause for the issuance of the warrant. *Rickman v. State*, 361 So.2d 22 (Ala.Cr.App. 1978); *Hatton supra; Attorney General v. State*, 286 Ala. 117, 237 So.2d 640 (1970). The corroboration, however, must be of incriminating details and not general innocent information. *Waters v. State*, 360 So.2d 347 (Ala.Cr.App. 1978); *Murray v. State*, 396 So.2d 125 (Ala.Cr.App. 1981). In this affidavit, the Narcotics and Intelligence Bureau only corroborated innocent details such as Mr. Sumner's address, his automobile, the establishment of a power account and a cursory NCIC computer check. No corroboration was made of any incriminating details, so there was nothing in this case beyond mere *suspicion* that Mr. Sumner might have had drugs in his possession. That is an insufficient nexus between the corroborated details and the alleged crime. There is nothing to negate the chance that the informer is, for his own reasons, pointing to an innocent man. *Stikes, supra.*

Horzempa v. State, 290 So.2d 217 (1973), had a much stronger showing of reliability and credibility than Mr. Sumner's case does. In *Horzempa, id*, however, the warrant *still failed* because it lacked sufficient underlying circumstances to establish probable cause. Two different reliable informants had been in the defendant's residence of several occasions and had made numerous drug buys for the affiant over a space of two weeks, the last of which was three days preceding the warrant. Both informants stated that the drugs were in the defendant's house. The Supreme Court of Alabama held that the information given was insufficient to support probable cause for a search warrant.

> But the instant affidavit . . . does not state how the informants learned of the drugs being in the house. Nor does it show how they arrived at the statement as to the presence of the drugs being there "now". Nor does it show whether the informants saw, touched, smelled, bought, or otherwise came in contact with the drugs on the several "recent" occasions when they were in the residence.

Neugent v. State, 340 So.2d 43, 49 (1975) (quoting *Horzempa*). If the information provided in *Horzempa, supra*, is insufficient, then the information in Mr. Sumner's case is certainly not enough to support probable cause.

The trial court found the case of *Bishop v. State*, 518 So.2d 829 (Ala.Cr. App. 1987), to be controlling. (Vol. II, CR-56). *Bishop, id*, however, has some additional facts that are not present in Mr. Sumner's case. In addition to verifying innocuous information, the police in *Bishop, supra*, began a surveillance on the defendant's residence. A known drug offender, Neece, was seen going in and out of the defendant's residence, and after he exited the house he was subsequently stopped and cocaine was found in his possession which had been purchased with marked currency supplied by the Mobile County Sheriff's Department. This type of corroboration is certainly more valuable and reliable in supporting probable cause than that in Mr. Sumner's case. *Bishop, supra*, then, is not controlling as the trial court held.

In Mr. Sumner's case, the affidavit is void of any facts from which a magistrate could reasonably conclude that the informant is credible or that his information is reliable. There is no allegation of the previous reliability of this informant. No underlying facts were provided demonstrating the credibility of the informant or the basis of his knowledge. There was no nexus between the particular transaction upon which the warrant was issued and the informant's tip. The "tip" provided nothing more than a conclusion or rumor that Mr. Sumner was engaging in "suspect" activities. When there is no basis of knowledge, even elaborate detail is insufficient because it does not eliminate the possibility that the informant's conclusions are based on unjustified speculation or rumor of the defendant's general reputation. "What should be required, then before details are characterized as self-verifying, is that *the facts detailed are incriminating facts rather than innocent facts*." W. LaFave, 1 *Search and Seizure* 675 (1978). The affidavit in this case, does not meet the "totality of the circumstances" set out in *Gates, supra*, nor does it meet either prong of the *Aguilar-Spinelli* test. The affidavit is, therefore, insufficient, and cannot be used to support probable cause.

IN THE
COURT OF CRIMINAL APPEALS OF ALABAMA

3 DIV. 81

STATE OF ALABAMA

Plaintiff/Appellee,

vs.

DENNIS RAY SUMNER

Defendant/Appellant

Case No. CC-88-1405-PH
Appealed from Montgomery County Circuit Court
Fifteenth Judicial Circuit of Alabama

REPLY BRIEF OF APPELLANT

DAVID S. LUKER
ATTORNEY FOR APPELLANT
2205 Morris Avenue
Birmingham, AL 35203
(205) 251-6666

ARGUMENT

ISSUE ONE

DID THE TRIAL COURT ERR BY NOT ALLOWING THE DEFENDANT AND HIS COUNSEL ADEQUATE OPPORTUNITY TO CONSULT OUTSIDE OF THE PRESENCE OF THE VENIRE PRIOR TO STRIKING THE JURY?

The Defendant, Dennis Ray Sumner, was denied his right to assistance of counsel during a critical stage of his trial. Mr. Sumner was unable to participate in his own defense, and his counsel was not allowed to effectively assist him during jury selection. A denial or deprivation of the right to assistance of counsel during a crucial stage of the trial is error. *Crutchfield v. Wainwright*, 803 F.2d 1103 (11th Cir. 1986); *Ashurst v. State*, 424 So.2d 691 (Ala.Cr.App. 1982); *Payne v. State*, 421 So.2d 1303 (Ala.Cr.App. 1982). The State argues that because Mr. Sumner and his counsel were both present during the voir dire and the exercising of strikes, that he was not prohibited from communicating with his counsel or offering his input on the selection of the jurors. *Ashurst, supra*, held, however, that "*a restriction, however brief*, on a criminal defendant's right to confer with counsel is tantamount to an unconstitutional deprivation of the right to counsel." *Ashurst, supra*, citing *Payne, supra*, at 1305. The defendant in this case was restricted not only by the proximity of the jurors, but also by the judge himself, who denied the Defendant's request for a few moments alone outside of the presence of the jury prior to striking. The potential for prejudicing jurors by their overhearing discussions between the Defendant and his counsel clearly inhibited an adequate attorney/client relationship at that point. "Where *actual or constructive* denial of assistance of counsel occurs, a per se rule of prejudice applies." *Crutchfield, supra*, citing *Chadwick v. Green*, 740 F.2d at 900 note 3 (11th Cir. 1984). emphasis added.

The right to counsel is the right to the *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 note 14, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). The Sixth Amendment requires not merely the provision of counsel to the

accused, but "Assistance" which is to be "for his defense". *Provision* of counsel without *assistance* of counsel "could convert the appointment of counsel into a sham, and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel". *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 322, 84 L.Ed.2d 377 (1940). Just because Mr. Sumner's counsel was seated at the table with Mr. Sumner during jury selection, did not mean that they could adequately interact with each other and have an effective attorney/client relationship. By not being allowed to confer outside of the presence of the jury, the Defendant's choices were limited to either restricting his attorney/client relationship, or having an effective attorney/client relationship, but at the same time prejudicing and offending potential jurors who observed Mr. Sumner and his counsel fully interact. A "Catch 22" situation such as this, clearly constitutes reversible error and violates the intention of the Sixth Amendment of the United States Constitution, as well as the Fifth and Fourteenth Amendments to the Constitution. Based on the foregoing Argument and the Argument in the Defendant's original Brief on Appeal, Mr. Sumner's conviction is due to be reversed.

ARGUMENT

ISSUE TWO

DID THE TRIAL COURT ERR BY OVERRULING THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT?

The State argues that a substantial basis existed to justify the issuance of a search warrant at Mr. Sumner's residence. When the "totality of the circumstances" test is applied to the facts in Mr. Sumner's case, however, it is clear that the affidavit does not meet the probable cause necessary for issuing a search warrant. The unanimous caller never stated that he had personal knowledge, how he came to know the information that he relayed to the police, or his connection with Mr. Sumner. There is clearly no basis of knowledge or

underlying circumstances showing how the informant obtained his information, or how he concluded that Mr. Sumner was engaged in criminal activity. "The mere assertion that the informant speaks from personal knowledge, *without a factual basis or data illustrative of that conclusion,* is not sufficient." *United States v. Long,* 142 U.S. App. D.C. 118, 439 F.2d 628 (1971); *Channell v. State,* 477 So.2d 522 (Ala.Cr. App. 1985); *Hatton v. State,* 359 So.2d 822 (Ala.Cr.App. 1977) (emphasis added). Conclusions or presumptions made by an informant are inadequate to support probable cause.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in *sufficient detail* that the Magistrate may know that he is relying on *something more substantial than a casual rumor circulating in the underworld of an accusation based merely on an individual's general reputation.* (emphasis added) *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

The fact that the police verified "innocent information", is not enough to overcome the lack of the basis of knowledge. Corroboration must be of incriminating details, and not general innocent information. *Waters v. State,* 360 So.2d 347 (Ala.Cr.App. 1978); *Murray v. State,* 396 So.2d 125 (Ala.Cr. App. 1981). The Montgomery Narcotics and Intelligence Bureau only corroborated innocent details such as Mr. Sumner's address, his automobile, the establishment of a power account, and a cursory NCIC computer check. No corroboration was made of any incriminating details, so there was nothing in this case beyond mere *suspicion* that Mr. Sumner *might* have had drugs in his possession. The informant never told police *when* he saw drugs in Mr. Sumner's trailer, nor did he ever say that he had seen *the drugs* that Mr. Sumner allegedly brought back from South Carolina. In order to support a search warrant, the proof supplied must speak as of the time of the issuance of the warrant. *Sgro v. United States,* 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed.2d 260, 263 (1932); *Reese v. State,* 456 So.2d 341 (Ala.Cr.App. 1982). Because there is no showing that the informant knew

of drugs being stored in Mr. Sumner's trailer *at the time in question*, the warrant is defective.

In addition to the above defects in the search warrant, the credibility and reliability of the informant are also lacking in this case. There is no showing of past performance by the informant, nor did he incriminate himself in any way to demonstrate his credibility and reliability. The informant used in Mr. Sumner's case had never been used before, nor has he been used since Mr. Sumner's search warrant was executed. The police never obtained his identity, nor did they obtain sufficient detailed information from him to support his credibility and reliability. Although the trial court found the case of *Bishop v. State*, 518 So.2d 829 (Ala.Cr.App. 1987) to be controlling, the defendant's case is distinguished from *Bishop, supra*. In *Bishop*, in addition to verifying the innocuous information, the police began a surveillance on the defendant's residence. A known drug offender was seen going in and out of the defendant's residence, and he was subsequently stopped, and cocaine was found in his possession. The cocaine had been purchased with marked currency supplied by the Mobile County Sheriff's Department. Clearly, this type of corroboration in surveillance is more valuable and reliable in supporting probable cause, and distinguishes Mr. Sumner's case from that of *Bishop*. In *Horzempa v. State*, 290 So.2d 217 (1973), *two different reliable informants* had been in the defendant's residence on several occasions, and had made numerous drug buys for the affiant over a space of two weeks, the last of which was three days preceding the warrant. Both of the informants stated that the drugs were in the defendant's residence. The warrant *still failed*, however, because it lacked sufficient underlying circumstances to establish probable cause.

> But the instant affidavit . . . does not state how the informants learned of the drugs being in the house, nor does it show how they arrived at the statement as to the presence of the drugs being there "now", nor does it show whether the informants saw, touched, smelled, bought, or otherwise came in contact with the drugs on the several "recent" occasions when

> they were in the residence. *Neugent v. State*, 340 So.2d 43 (1975), quoting *Horzempa*.

If the information provided in *Horzempa*, *supra*, is insufficient, then the information in Mr. Sumner's case is clearly not enough to support probable cause.

In Mr. Sumner's case, the affidavit is void of any facts from which a Magistrate could reasonably conclude that the informant is credible or that his information is reliable. There is no allegation of the reliability or credibility of the informant, or his basis of knowledge. The tip was not detailed, and it provided nothing more than a conclusion or rumor that Mr. Sumner was engaging in "suspect" activities. In addition, there is no nexus between the particular transaction upon which the warrant was issued and the informant's tip. The affidavit in this case does not meet the "totality of the circumstances" test set out in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), or either prong of the *Aguilar-Spinelli* test. The affidavit is clearly insufficient, and cannot be used to support probable cause. The defendant's conviction is due to be reserved.

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
	)	
PLAINTIFF	)	
	)	
VS.	)	CASE NO. CC 88-1405-PH
	)	
DENNIS RAY SUMNER,	)	
	)	
	)	
DEFENDANT.	)	

MOTION TO SUPPRESS EVIDENCE

Comes now your defendant, by and through his undersigned attorney, and moves this Honorable Court for an Order suppressing all evidence, tangible or intangible, real or personal, of any kind seized or obtained as a result of the searches or seizures in this case. Specifically, defendant moves this Court to suppress all evidence of an incriminating nature found by officers on the person of defendant or at the Defendants residence to suppress all medical and scientific examinations, test results or conclusions based thereon. Further, to suppress all inculpatory statements made by the defendant to the Sheriff, District Attorney, police officers or other law enforcement officials or the agents thereon. In support of said motion, defendant assigns the following grounds, separately and severally;

1. All or part of the evidence against defendant was obtained directly or indirectly as a result of an illegal arrest and search of defendant and his premises without probable cause to believe defendant had committed a felony, all in violation of Article I, Section 5 of the Alabama Constitution of 1901 and the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and the statutes and judicial decisions with respect thereto.

2. The affidavit submitted to the issuing Judge was legally deficient.

3. The search warrant was illegally issued and was not based on probable cause sufficient to justify its issuance.

4. The seizure of evidence herein was illegal, an exploratory search, and not in conformity with the directions of the issuing Magistrate so far as the items searched for and seized were concerned.

5. Defendant was not under legal arrest prior to said search, nor did said defendant commit a criminal offense in the presence of arresting officer which would justify his arrest.

6. The search and seizure was a general exploratory search not supported by probable cause.

7. The information provided the Magistrate was the unsupported double hearsay information of an unreliable informant.

8. The affiant had no personal knowledge of sufficient facts to justify the issuing Magistrate to determine the existence of probable casue for the issuance of the search warrant.

9. The affidavit and warrant fail to allege sufficient facts and information to support a belief and probable cause that the property sought to be seized was on the premises.

10. The Magistrate incorrectly found probable cause.

11. The affidavit lacks sufficient specificity in describing the location and directions to comply with the Fourth Amendment.

12. This motion is sought by the defendant as a continuing motion since it is contemplated that the prosecution will attempt to offer the items seized in the illegal arrest, search or seizure, or offer testimony concerning these items before the trier of fact.

13. Any statement or admission by defendant was in violation of his constitutional rights.

WHEREFORE, for such reason as set forth in this motion, and as may be further shown to this Honorable Court at a hearing on this motion, defendant respectfully prays;

A. That a pre-trial hearing be held in this matter.

B. That all evidence, both tangible and intangible, real and personal, and all statements or admissions by defendant, seized or obtained as a result of the arrest and subsequent searches be excluded.

C. That the state be prohibited from introducing in evidence any evidence or statement seized or obtained as a result of the illegal arrest or searches described herein.

D. That the state release all non-contraband items to defendant.

E. That defendant be accorded such other relief, legal and equitable as this Court deems maze and proper.

/s/ David S. Luker

DAVID S. LUKER
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on the District Attorney of Montgomery County, on this 16th day of June, 1988.

/s/ David S. Luker

DAVID S. LUKER

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	CASE NO.- CC88-1405
	)	
DENNIS RAY SUMNER,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT'S MOTION TO SUPPRESS

The Defendant's Motion to Suppress should be granted because the search warrant and affidavit are insufficient to support probable cause, as required by the *Code of Alabama*, Section 15-5-3 (1975). "A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly describing the property and place to be searched." The warrant, based upon information from an anonymous caller, fails to meet the requirements of *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983), *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and their progeny.

An anonymous caller telephoned the Narcotics and Intelligence Bureau of the Montgomery, Alabama Police Department on March 28, 1988. The caller reported information to Detective David Byrd regarding the Defendant, Dennis Sumner. A search warrant was issued based upon the information and the Defendant was ultimately arrested. The search warrant, however, is defective in several respects.

The anonymous caller has not been proven to be reliable or credible, or have a basis of knowledge upon which to rest his information. *Aguilar, supra,* requires that (1) facts be brought before the magistrate so that he may determine either the inherent credibility of the informant or the reliability of his information on the particular occasion, and (2) facts be revealed that permit the magistrate to determine whether the informant had a basis for the allegations that a certain person had been, was or would be involved in criminal conduct or that evidence of crime would be found at a certain place.

In *Illinois v. Gates,* 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), the United States Supreme Court formulated a more flexible standard for evaluating the facial sufficiency of an affidavit based on an informant tip. The *Gates, supra,* "totality of the circumstances" was substituted for *Aguilar's, supra,* two-pronged test.

> "The task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidivat before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates, supra,* at 2332 (quoting *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 75, 4 L.Ed.2d 697 (1960).

The *Aguilar-Spinelli* analysis has not been eliminated from the factors which the magistrate must consider, however.

> Though an informant's "veracity" and "basis of knowledge" are no longer to be understood as entirely separate and independent requirements, they are still "highly relevant" in determining whether probable cause exists. *Gates, supra,* at 2327. *Gates,* therefore, abandoned only the strict application of the old test, *not* the substance of veracity, reliability and basis of knowledge.

The second prong of *Aguilar, supra,* requires that the informant have a "basis of knowledge." The affidavit in this case does not state that the informant had personal knowl-

edge or how he claims to know the information, or his connection with the Defendant. We do not know the basis of knowledge of the informant. There are no underlying circumstances showing how the informant obtained his information or how he concluded that the Defendant was engaged in criminal activity. "The mere assertion that the informant speaks from personal knowledge without a factual basis or data illustrative of that conclusion is not sufficient." *Hatton v. State, supra; United States v. Long,* 142 U.S.App.D.C. 118, 439 F.2d 628 (1971); *Channell v. State,* 477 So.2d 522 (Ala.Cr.App. 1985).

Spinelli, supra, holds that self-verifying details may be enough to overcome the lack of a basis of knowledge.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on a individual's general reputation.

That detail, however, is missing from the affidavit in this case. The only information the caller gave was very general in nature and not detailed enough to overcome the lack of a basis of knowlege. Details such as the Defendant's nickname, his address, the kind of car he drives, his physical description and where he is from are all general in nature, and things that anyone casually acquainted with the Defendant would know. LaFave states that even elaborate detail is not sufficient because it does not eliminate the possibility that the informant's conclusions are based on unjustified speculation or rumor of the defendant's general reputation. W. LaFave, 1 *Search and Seizure* 675 (1978). The details, at best, are not sufficient.

> What should be required, then, before details are characterized as self-verifying, is that the facts detailed are incriminating facts rather than innocent facts. LaFave, *supra.*

The only remotely incriminating fact that the caller supplied was that two days prior to the call, the Defendant "returned from somewhere in South Carolina" with cocaine and marijuana. Once again, this is speculation because the caller failed to show his basis of knowledge or credibility and reliability. It is a general conclusion that could easily have been made up because of knowledge of the Defendant's South Carolina license tages on his car. There is absolutely no showing that the informant saw the alleged cocaine and marijuana or even that the caller could identify the substances had he seen them. The tip is conclusory only, not supported by any factual basis. "The mere conclusion of an informant is not sufficient to establish probable cause. The informant must have some basis for the conclusion, and he must relate that basis to the law enforcement officer." *Roberson v. State,* 340 So.2d 459 (1976). Here the record does not disclose any basis to support the conclusion of the informant. Detective Byrd did not inquire how the informant gained his knowledge nor did the informant volunteer such information. The caller's conclusions then are insufficient to constitute a basis of knowledge.

The only other piece of information that the caller provided was a description of the area where the Defendant allegedly "stores drugs". We have no way of knowing whether this information is reliable, or whether it relates to this particular transaction. This general allegation does not speak to the time of the alleged transaction in question, so there is no nexus tying the alleged crime to the tip. *Stikes v. State,* 397 So. 2d 178 (Ala.Cr.App. 1981). When the information has no connection with the date of the issuance of the warrant there is no existing present cause to support a warrant. According to *Walker v. State,* 275 So.2d 724 (Ala.Cr. App. 1973) and *Keller v. State,* 305 So.2d 402 (Ala.Cr.App. 1974) vaguness of the time element is fatal in affidavits supporting search warrants. In order to support a search warrant, the proof supplied must speak as of the time of the issuance of the warrant. *Sgro v. United States,* 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed. 260, 263 (1932); *Reese v. State,* 456 So.2d 341 (Ala.Cr.App. 1982); *Travis v. State,* 381 So.2d 97, 100 (Ala.Cr.App. 1979), *cert. denied,* 381 So.2d 102

(Ala. 1980). Not only is the tip supplied here vague in time, but it also speaks in a tense that does not tie it to the particular transaction in question. Although the caller had apparently been in the Defendant's trailer at some point there is no indication of when, nor is there any showing that he had seen drugs in the trailer before or since the Defendant's alleged return from South Carolina, the transaction upon which the warrant is based.

Attorney Payne: "Did he indicate — did he indicate that he had been in that house?"

Detective Byrd: "The caller — ."

Q.: "I'm going to call it the trailer."

A: "The caller had been in the house as far as the caller indicated to me."

Q: "What I think — did he indicate to you in the conversation that he had previously been in there?"

A: "Yes, sir."

Q: "Did he indicate when was the last time he had been in there?"

A: "He did not say."

Because there is no showing that the informant knew of drugs being stored in the Defendant's trailer at the time in question, the warrant is defective.

> We conclude that a combination of undated, conclusory information from an anonymous source and an undated general allegation of personal observation by the affiant, with no other reasonably specific clues to the time of their happening, is inadequate. . . . Police officers have long been accustomed to the importance of time; to their credit, the overwhelming majority of affidavits have honored the requirement." *Davis v. State*, 237 So.2d 635 (1969) at 639 (quoting *Rosencranz v. United States*, 1 Cir., 356 F.2d 310).

This particular case is in the minority, however, and fails to satisfy the time element. "Absent fresh information, the likelihood that illegal contraband is still on the premises

becomes too remote to support finding of probable cause." (*Keller, supra,* at 404). Although the affidavit need not state the exact time the informant observed the offense, the affidavit in the instant case fails to state any time at all that the caller observed the alleged transaction. This clearly is insufficient.

In *Ogle v. State,* 448 So.2d 440 (Ala. 1983), the defendant argued that there was no probable cause to issue an search warrant for his home. The affidavit accompanying the search warrant read, "A reliable informant who has proven to be reliable in the past stated to the effect that he has seen on said premises within the past twenty-four hours a quantity of marijuana contary (sic) to law." In finding that probable cause had been established, the Alabama Supreme Court cited *Gates, supra,* on the proposition that "even if we entertain some doubt as to an informant's motives, his *explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand,* entitled his tip to greater weight then might otherwise be the case." *Gates, supra,* at 2329 (emphasis added). In this case, however, the affidavit lacks *both* the detailed description *and* a statement that the event was observed first-hand *at all,* much less in within the past twenty-four hours. In addition there is no indication of the reliability of the informant.

Pilkington v. State, 343 So.2d 551 (Ala.Cr.App. 1977), supports the idea of first-hand observation. In *Pilkington, supra,* a reliable informant told a police officer that the defendant had stolen articles in his possession. The Court of Criminal Appeals held the warrant insufficient because there was no showing of the circumstances on which the informant based his information. The Court said:

> It is unknown whether the informant obtained his information from personal observation of the guns and pills at the Kountry Kitchen or "from an off-hand remark heard at neighborhood bar." Thus, the basis of the informant's information is not here shown. *Pilkington, supra,* at 551 (quoting *Spinelli, supra*).

The first prong of *Aguilar, supra,* required a showing of credibility of the informant and reliability of his information

on the particular occasion. In this case, the warrant and affidavit do not show that the caller was "credible" or reliable". The most commonly used means of establishing credibility is by showing past performance of the informant. Detective David Byrd, who spoke with the caller stated that he did not know the caller, never got a name for the caller, and had never talked to the caller before or since the 28th of March, 1988. The credibility of the informant is therefore, lacking.

Attorney Payne: "Okay. Did you know the caller?"

Detective Byrd: "No."

Q: "Did you ever get a name for the caller?"

A: "I have no name."

Attorney Luker: "This may be repetitious, but I didn't hear it a minute ago. This was an anonymous caller who you had never talked to before and have never talked to since?"

Detective Byrd: "That's correct."

The information supplied by the informant is questionable because the warrant is silent as to how the informant learned his information on this occasion. The reliability of the caller's information can be established if it is shown to be a declaration against the informant's interest. Admissions of crime or involvement in criminal activities carry their own indicia of reliability. Here, however, the informant told Detective Byrd that he had not made a buy of any sort from the Defendant nor had he ever seen anyone else do so. The caller's information, then, cannot be reliable based upon his past performance.

Attorney Payne: "But he had not made a buy of any sort?"

Detective Byrd: "No."

Q: "Did he tell you whether he saw a buyer of any sort when he was in he trailer?"

A: "If he had seen a buyer?"

Q: "Yes."

A: "No. He didn't say that."

When an unknown or questionable informer is used, as in this case, his tip may be corroborated to establish probable cause for the issuance of the warrant: *Rickman v. State,* 361 So.2d 22 (Ala.Cr.App. 1978); *Ex Parte State ex rel. Attorney General v. State,* 286 Ala. 117, 237 So.2d 640 (1970); *Hatton v. State,* 359 So. 2nd 822 (Ala.Cr.App. 1977). The corroboration however, must be of incriminating details and not general innocent information. *Waters v. State,* 360 So.2nd 347 (Ala.Cr.App. 1978); *Murray v. State,* 396 So.2d 125 (Ala.Cr. App. 1981). In the affidavit in question, the Narcotics and Intelligence Bureau only corroborated innocent details such as the address, the automobile, the establishment of a power account and an NCIC computer check of the Defendant's past record. There was no corroboration of any incriminating detail, so there was nothing beyond mere suspicion that the Defendant had drugs in his possession. This is "an insufficient nexus between the corroborated detail and the alleged crime to negate the chance that the informer is, for his own reasons, pointing to an innocent man." *Stikes, supra,* at 182.

Horzempa v. State, 290 So.2d 217 (1973), had a much stronger showing of reliability and credibility than does the present case, but the warrant still failed because it lacked sufficient underlying circumstances to establish probable cause. In *Horzempa, supra,* two different reliable informants had been in the defendant's residence on several occasions and had made numerous drug buys for the affiant over a space of two weeks, the last of which was three days preceding the warrant. Both informants stated that the drugs were in the defendant's house. The Supreme Court of Alabama held that the information given was insufficient to support probable cause for a search warrant.

> But the instant affidavit . . . does not state how the informants learned of the drugs being in the house. Nor does it show how they arrived at the statement as to the presence of the drugs being there "now." Nor does it show whether the informants saw, touched, smelled, bought, or otherwise came in contact with the drugs on the several "recent" occasions when they were in the residence. *Neugent v. State,* 340 So.2d 43 (1975) at 49, (quoting *Horzempa, supra*).

If that is insufficient, then the facts in this case are certainly not enough to support probable cause.

All we have in the present case is an undated general allegation of a supposedly personal observation by an unknown, unreliable informant with no reasonably specific clues as to the unreliable informant with no reasonably specific clues as to the time of the observation. There are no underlying facts demonstrating the credibility of the informant, the reliability of his information, or the basis of his knowledge. Nor is there any connection with the particular transaction upon which the warrant was issued. The "tip" provides nothing more than a conclusion that the Defendant was engaging in criminal activities. The affidavit in this case, does not meet either prong of the *Aguilar - Spinelli* test, nor does it meet the "totality of the circumstances standard set out in *Gates, supra.* The warrant is, therefore, insufficient, and cannot be used to support probable cause.

/s/ David S. Luker

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Memorandum of Law in Support of Defendant's Motion to Suppress on the District Attorney of Montgomery County, via hand delivery on this the 22d day of August, 1988.

/s/ David S. Luker

DAVID S. LUKER